(25)

No. 91-543-CFX
Status: GRANTED

Title: New York, Petitioner
v.
United States, et al.

Docketed:
September 30, 1991

Court: United States Court of Appeals
for the Second Circuit

Vide:
91-558
91-563

Counsel for petitioner: Schiff,Peter H.

Counsel for respondent: Solicitor General, Hudson,James P., Miller,Allen T., Sikaras,James T., Gerrard,Michael B., Silverman,Donald J., Hudson,James Patrick

Entry	Date	Note	Proceedings and Orders
1	Sep 30 1991	G	Petition for writ of certiorari filed.
3	Oct 29 1991		Order extending time to file response to petition until December 6, 1991.
5	Oct 29 1991		Brief amicus curiae of Connecticut filed.
6	Oct 29 1991		Brief amicus curiae of Michigan filed.
4	Oct 31 1991		Brief amicus curiae of Ohio, et al. filed.
7	Dec 6 1991		Brief of respondent United States in opposition filed. VIDED.
9	Dec 6 1991	X	Brief of respondents Washington, Nevada and South Carolina in opposition filed. VIDED.
8	Dec 11 1991		DISTRIBUTED. January 10, 1992
10	Jan 10 1992		Petition GRANTED. Petitioners brief and the joint appendix are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., February 14, 1992. Respondent's brief is to be filed with the Clerk and served upon opposing ocunsel on or before 3 p.m., March 5. 1992. Reply briefs are to be filed with the Clerk and served upon opposing counsel in accordance with Rule 25.3. Oral argument is scheduled for the March Session beginning March 23, 1992.
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25	Feb 5 1992		SET FOR ARGUMENT MONDAY, MARCH 30, 1992. (1ST CASE).
17	Feb 12 1992		Brief amicus curiae of Connecticut filed. VIDED.
18	Feb 12 1992		Brief amicus curiae of Michigan filed. VIDED.
13	Feb 13 1992		Joint appendix filed. VIDED.
14	Feb 13 1992		Brief of petitioner County of Courtland, New York filed. VIDED.
15	Feb 13 1992		Brief of petitioner County of Allegany filed. VIDED.
16	Feb 13 1992		Brief of petitioner New York filed. VIDED.
11	Feb 14 1992	G	Motion of Council of State Governments for leave to file a brief as amicus curiae filed.
12	Feb 14 1992		LODGING consisting of four newspaper articles received from amicus Council of State Governments.
19	Feb 14 1992		Brief amici curiae of Ohio, et al. filed. VIDED.
20	Feb 21 1992		CIRCULATED.
22	Feb 27 1992	G	Motion of respondents Washington, et al. for divided argument filed.
21	Mar 2 1992		Motion of Council of State Governments for leave to file a brief as amicus curiae GRANTED.
24	Mar 2 1992		Record filed.

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No. 91-543-CFX

Entry	Date	Note	Proceedings and Orders
		*	Record proceedings U.S.C.A., Second Circuit and U.S.D.C., Northern District of New York. (1 Box)
26	Mar 3 1992		Opposition of Washington, Nevada and South Carolina to motion of Council of State Governments for leave to file a brief as amicus curiae filed.
27	Mar 4 1992	X	Brief amici curiae of Rocky Mountain Low-Level Radioactive Waste Compact, et al. filed. VIDED.
28	Mar 4 1992	X	Brief amicus curiae of US Ecology, Inc. filed. VIDED.
29	Mar 4 1992	X	Brief amici curiae of American College of Nuclear Physicians, et al. filed. VIDED.
30	Mar 4 1992	X	Brief of respondents Washington, Nevada and South Carolina filed. VIDED.
31	Mar 4 1992	X	Brief of respondent United States filed. VIDED.
32	Mar 5 1992		LODGING by Solicitor General. (1 copy of 3 energy reports.)
33	Mar 5 1992	X	Brief amicus curiae of AFL/CIO filed. VIDED.
23	Mar 9 1992		Motion of respondents Washington, et al. for divided argument GRANTED.
34	Mar 20 1992	X	Reply brief of petitioner County of Alleghany filed. VIDED.
35	Mar 20 1992	X	Reply brief of petitioner County of Courtland filed. VIDED.
36	Mar 20 1992	X	Reply brief of petitioner New York filed. VIDED.
37	Mar 30 1992		ARGUED.

No. 91-543

Supreme Court, U.S.
FILED
SEP 30 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK,

Petitioner,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as Acting United States Attorney General,

Defendants,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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September 27, 1991

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1991
(1379—LC4-527)

Question Presented

Whether Congress, consistent with the limits imposed by the Constitution and especially the Tenth Amendment, may directly compel a State to "be responsible for" and develop a plan for the disposal of low-level radioactive waste produced by private, state, and some federal generators within the State's borders, and may require the State to take title to, assume possession of, and be legally liable for such waste if it fails to develop and implement such a plan.

Parties

The parties to the proceeding below were:

1. The State of New York, Plaintiff;

2. The County of Allegany, New York, Plaintiff;

3. The County of Cortland, New York, Plaintiff;

4. The United States of America, Defendant;

5. James D. Watkins, as Secretary of Energy, Defendant;

6. Kenneth M. Carr, as Chairman of the United States Nuclear Regulatory Commission, Defendant;

7. Samuel K. Skinner, as Secretary of Transportation, Defendant;

8. William P. Barr, as Acting United States Attorney General, Defendant;[1]

9. The State of Washington, Intervenor;

10. The State of Nevada, Intervenor;

11. The State of South Carolina, Intervenor.

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[1]In the proceedings below, Richard Thornburgh was named as a defendant in his capacity as United States Attorney General. Mr. Barr, who is currently Acting United States Attorney General, has been substituted pursuant to Supreme Court Rule 35.3.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

THE STATE OF NEW YORK,

Petitioner,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as Acting United States Attorney General,

Defendants,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner State of New York respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on August 8, 1991 (Nos. 91-6031, 91-6033 and 91-6035).

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at ____ F2d ____ (2d Cir August 8, 1991) (Westlaw 1991 WL 150660), and is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion of the District Court is reported at 757 F Supp 10 (NDNY 1990), and is reprinted in the appendix hereto, p. 18a, *infra*.

Jurisdiction

Invoking federal jurisdiction under 28 USC §§ 1331, 1337, 1346, 2201, and 2202, petitioner and other plaintiffs brought this suit in the Northern District of New York. On December 7, 1990, the Northern District granted defendants' motion to dismiss the complaint. See p. 18a, *infra*.

On plaintiffs' appeals, the Second Circuit on August 8, 1991 entered a judgment and opinion affirming the District Court's order. See p. 1a, *infra*.

This Court's jurisdiction is invoked under 28 USC § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

42 USC § 2021c(a)(1):

> Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—
>
> (A) low-level radioactive waste generated within the State (other than by the the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983;
>
> (B) low-level radioactive waste described in subparagraph (A) that is generated by the Federal Government except such waste that is—
>
> (i) owned or generated by the Department of Energy;
>
> (ii) owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy; or
>
> (iii) owned or generated as a result of any research, development, testing, or production of any atomic weapon * * * *

42 USC § 2021e (d) (2) (C):

* * *

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

Statement of the Case

In an effort to provide for the secure disposal of low-level radioactive waste materials generated throughout the United States, Congress enacted the Low Level Radioactive Waste Policy Act (Pub. L. 96-573) in 1980.[2] That legislation set forth a federal policy that each State, in its capacity as state sovereign, was responsible for providing for the disposal of low-level radioactive waste generated within its borders by private, state, and certain federal producers; empowered States to form interstate compacts to meet these duties; and enabled compact States to bar use of compact facilities for the disposal of waste generated outside the compact region after January 1, 1986. P.L. 96-573, §§ 4(a)(1), 4(a)(2)(B).

[2]Low-level radioactive waste was defined in the 1980 Act as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954." P.L. 96-573, § 2(2).

While a majority of states joined or proposed to join compacts in the years following the passage of the 1980 Act, no new state or regional disposal facilities were projected to become operational until the early 1990s. Consequently, the exclusion provision of the 1980 Act posed a problem: congressional ratification of proposed compacts whose members operated existing disposal sites (Washington, Nevada, and South Carolina) might have denied access to disposal sites to all states who were not in those compacts. Accordingly, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USC §§ 2021b-2021i) to permit ratification of proposed compacts while granting all states continued limited access to existing disposal sites.

The 1985 Act assigned to the States in their sovereign capacity mandatory responsibility for the disposal of low-level radioactive waste.[3] It further provided that conditional access to disposal sites in Washington, Nevada, and South Carolina would be granted to all states between January 1, 1986 and December 31, 1992, and set forth a detailed transition scheme, with incentives and penalties, to

[3]The 1985 Act defines low-level radioactive waste (LLRW) as radioactive material that: (a) is not "high-level" radioactive waste, spent nuclear fuel, or by-product material as defined at 42 USC § 2014(e)(2); and (b) is classified as LLRW by the Nuclear Regulatory Commission. Nationwide, about 90% of the volume and 97% of radioactivity of LLRW for which the 1985 Act assigns disposal responsibility to the states comes from nuclear power plants and other industrial sources; the remainder is generated by research laboratories, hospitals, and medical centers.

The Act requires the States to be responsible for disposal of Class A waste (containing radioactivity which will diminish to a safe exposure level within 100 years), Class B waste, and Class C waste (requiring protection against exposure for 500 years). Class C waste comprises less than 1% of volume and emits over 65% of the radiation of all LLRW.

encourage compact formation and disposal site development. 42 USC § 2021e.[4]

A novel affirmative directive of the 1985 Act was contained in 42 USC § 2021e(d)(2)(C):

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

With this provision, Congress decisively altered the method and impact of prior legislation regulating low-level radioactive waste disposal through encouragement and voluntary incentives. The new Act abruptly coupled "responsibility" for such waste with a free-standing mandate that each State develop a program for the disposal of waste generated within its borders by private and other generators, including some federal generators. It strengthened this

[4]By specific dates within that period, States and compacts were directed to comply with a number of regulatory requirements, including: ratification of compact legislation or indication of the State's intent to site a LLRW disposal facility in state, development of a siting plan, and license application (2021e[e] [1]). Failure to meet this schedule might result in added surcharges upon waste generators by disposal site operators, denial of access to the Washington, Nevada, and South Carolina sites, and loss of certain surcharge rebates to the States (2021e[d], [e]).

mandate through the command that States assume ownership and possession of, as well as legal liability for, such waste if they fail to comply with the federal scheme and timetable of regulation.

New York State's congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts.

In February, 1990, the State of New York and the Counties of Allegany and Cortland, New York, commenced an action in the United States District Court for the Northern District of New York against various federal defendants, seeking a declaration that, among other constitutional flaws, the 1985 Act violated the Tenth Amendment through the imposition of these broad new affirmative duties upon the States. The States of Washington, Nevada, and South Carolina subsequently joined the action as intervenors in support of defendants.

The District Court (Cholakis, J.) granted defendants' motion for summary judgment and dismissal of the complaint in a bench decision issued in December, 1990. Addressing the Tenth Amendment claim, the court declared that in light of this Court's holding in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), that "judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to inquiry of whether the political process has failed," Tenth Amendment review was proper only to discern "problems which may have had an untoward effect on a particular law's enactment or its subsequent political review" (22a, 25a). Finding that the 1985 Act imposed no restriction on New York's "ability to operate in the political arena and to challenge the law," the court found judicial review unwarranted on grounds of a failure of the political process.

While recognizing that *Garcia* left open the possibility of judicial review of the substantive impact of federal action under the Commerce Clause in exceptional cases, the court ruled that such exceptions arose only "when constitutional equality amongst the states has been jeopardized" by the federal act (23a). Finding no such jeopardy, nor other grounds for constitutional attack, in the 1985 Act, the court dismissed the State's and counties' complaint (26a).

On appeal, the Court of Appeals for the Second Circuit affirmed. In its decision, the court observed that, in light of Congress's traditional role in nuclear regulation, "appellants undertake an unusually burdensome task" in challenging the 1985 Act (10a). The court held that "both the 1980 Act and its 1985 Amendments are paragons of legislative success" (13a), and rejected any claim that the Act or its take title provision was the product of a failure in the political process.

The court found unpersuasive appellants' argument that *Garcia* permitted review of congressional mandates, such as the take title provision, which significantly limited the States' role in the federal system and thereby altered the federal constitutional structure. While it neither confirmed nor denied that such review is permissible, it endorsed the district court's holding that such review, if permissible, could consider only whether the federal act upset the "equality in dignity and power" among the several States (15a; citing *Coyle v Smith*, 221 US 559 [1911]). "In sum," the court noted (16a),

> we are satisfied that the take title provision does not undermine the constitutional structure. Neither does it violate principles of federalism as recently explained in *Garcia;* and '[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated.' [*South Carolina v] Baker*, 485 U.S. [505 (1988)] at 513 (emphasis in original).

The court also dismissed challenges to the Act based upon the Eleventh Amendment and the Guaranty Clause (16a-17a), and affirmed the grant of summary judgment to defendants.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision improperly narrows the scope of Tenth Amendment challenges under *Garcia*.

In its decision in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), this Court determined that the primary protection of state sovereign interests in the federal system lay with the federal political process and that Tenth Amendment challenges to federal statutes must generally allege a failure of that process. 469 US at 550, 554. This Court expressly recognized, however, that additional Tenth Amendment protection might be available to the States in cases where federal action, though not the product of a defective political process, was more intrusive than that reviewed in *Garcia* or its antecedents, stating (469 US at 556):

> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

We believe that the present case requires substantive consideration of the Tenth Amendment challenge even under the limited criteria of *Garcia*.

The contours of the constitutional structure referred to in *Garcia*, and the importance of the limits which it imposes, were recently set forth by this Court in *Gregory v. Ashcroft*, 111 S Ct 2395 (1991). Noting that the Constitution created a federal government of limited powers, including limitations under the Tenth Amendment, the Court observed (111 S Ct at 2399-2400):

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . .
>
> Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . .
>
> . . . In the tension between federal and state power lies the promise of liberty.

The courts below failed to recognize that the 1985 Act, and especially its take title provision, exceeds the limits imposed on federal action by the Tenth Amendment by seriously undermining the basic federal structure and sets a dangerous precedent for abuse of Congress's coordinate power in the federal system.

The 1985 Act differs fundamentally from all federal action previously reviewed by this Court under the Tenth Amendment. While it is not the first congressional act which seeks to have the States exercise their sovereign powers for federal purposes, it is the first to impose upon each State an affirmative duty to exercise sovereign powers of legislation and regulation within the State, in accordance with a federal regulatory scheme, without the State's consent, and with no option for the State's withdrawal from the role of regulator or actor in the field. The imposition is threefold: the broad assignment to the States of "responsibility" for a federal regulatory concern; the establishment of parameters and a timetable for compliance with that assignment of regulation; and the attachment of draconian, affirmative obligations on the States for a refusal or failure to meet that regulatory responsibility or timetable.

Most insidiously, under the 1985 Act, after January 1, 1996, States which do not provide for disposal of low level radioactive waste generated within their borders are made responsible by the Federal government for all such waste generated by private producers and some federal producers throughout the State. In a manner to our knowledge unprecedented, the take title provision transfers by congressional edict the ownership obligations of federal and private parties to the State. States are compelled by this provision to exercise their sovereign powers as agents of federal regulation, not as a consequence of reflection and decision by state legislative and executive branches, but by fiat of the Federal government. These duties and obligations are not imposed upon the State in its capacity as a generator of low-level waste like any other economic actor, or even in its capacity as an agreement state and past regulator of

such waste.[5] Rather, it is imposed solely in light of the State's sovereign capacity.

The 1985 Act, therefore, differs substantially from the amendments to the Fair Labor Standards Act reviewed in *Garcia,* which merely extended to state and local governments the regulations which imposed overtime, recordkeeping, and other obligations upon employers throughout the nation. These "generally applicable federal regulations" *(South Carolina v Baker,* 485 US 505, 515 [1988]) did not include requirements that States initiate or continue an employment program, or perform a unique role as regulator of hiring practices within their borders.

While Congress has in the past used the Commerce Clause as a basis for strongly encouraging state sovereign participation in federal regulatory schemes, such schemes have generally provided for voluntary state action in lieu of federal regulation (e.g., Clean Air Act, 42 USC §§ 7401 [a][3]; 7407[a]; Clean Water Act, 33 USC § 1251[b]), or have made voluntary receipt of federal funds contingent upon compliance (e.g., 23 USC § 154 [regulation of travel speed on public highways]). In cases where Congress directs that federal funding be contingent upon state participation in a federal regulatory scheme, States are left with

[5] Under federal guidance, New York State has been active in the regulation of such materials within its borders for close to three decades as an agreement state in accordance with 42 USC § 2021(b). In addition, the New York State Power Authority currently operates two nuclear power plants within the State, and waste materials are produced at various state hospitals and research facilities. Moreover, with federal encouragement the State voluntarily participated in an experimental program for nuclear waste management at West Valley, New York between 1963 and 1975; ultimately the program was terminated because of health and safety concerns. However, at no time prior to the 1980 and 1985 Acts was the State's role as a producer or regulator of low-level waste an obligatory burden imposed by the federal government. In each case, the role was determined by the State Legislature and Executive, in the exercise of their sovereign authority.

the choice of whether the state interests advanced by such funding outweighed the burden upon the state governmental structure in fulfilling the federal regulatory functions imposed upon it. A similar choice is available to state sovereigns in cases where a federal regulatory scheme offers States the opportunity to participate in lieu of federal regulators. In all such cases, although the choice may be difficult, and the realistic probability that the State will elect not to participate in the federal regulatory scheme may be small, the choice exists nonetheless.

We submit that this opportunity for the State to act through its legislature in determining whether to participate in a federal program is an essential aspect of the structure of the federal system. Without it, that structure is severely compromised. Absent the opportunity to abstain from federal regulatory schemes which invoke the States' sovereign powers, state governments are forced to become unwilling subordinate agents to congressional dictates. Absent the opportunity to make such decisions, they are sharply constrained in their ability, noted in *Garcia* and repeated in *Ashcroft,* to serve as laboratories for social and economic experiment, or "to engage in any activity that their citizens choose for the common weal." 469 US at 546. Without such options, not only may States be compelled to participate in federal regulatory schemes by inescapable congressional fiat, but they may also be obliged to assume responsibility for the full financial and administrative burden of such schemes.

Under the 1985 Act, States are required either to adopt a program regulating the disposal of non-state generated low-level radioactive waste in accordance with federal requirements or else to assume complete ownership responsibility for such wastes, including the liability that would

otherwise rest with the non-state generators under state law. In either case, the 1985 Act directly compels the State to take extensive sovereign action to manage private and federal low-level radioactive waste. This is, we submit, an unprecedented and unconstitutional exercise of federal power.

It is indisputable in this case that the 1985 Act treated a matter of serious national concern, was imposed by a well-intentioned Congress, and addressed a regulatory field where some States have voluntarily participated in the past. Indeed, New York State has sought for three decades to encourage the responsible development of nuclear power within its borders and has pioneered experiments in nuclear waste management technology. Throughout this period, however, each of the State's efforts as a generator and regulator of nuclear material was undertaken after careful reflection and decision by its legislative and executive branches, substituting for or augmenting an underlying scheme of federal regulation. In contrast, under the 1985 Act, States are denied the power to decide in broad terms whether and how their legislative and regulatory powers will be used. Though they are left with some flexibility in choosing the details of compliance with federal demands—e.g., whether or not to join a compact; how such a compact might be organized; whether or not the compact should exclude waste from non-member states, etc.—the terms of the take title provision bar States from reaching and implementing legislative decisions to decline or cease to exercise local sovereign power in the regulatory field.

The Act imposes an unprecedented substantive burden upon state members of the federal system. Its enactment evidences a truth expressly recognized by this Court in *Garcia:* the process of federal lawmaking, however informed and expeditious, does not guarantee that Con-

gress cannot err, and through such error, cause harm to the structure of the federal system.

To our knowledge, this Court has never before reviewed a regulatory scheme of this type in light of the Tenth Amendment. Prior to *Garcia,* however, this Court indicated its concern over efforts by the federal government to "use state regulatory machinery to advance federal goals." *Federal Energy Regulatory Commission (FERC) v Mississippi,* 456 US 742, 759 (1982). Upholding against Tenth Amendment challenge in *FERC* various sections of the federal Public Utility Regulatory Policies Act of 1978 (PURPA)—including a requirement that States hold public hearings and consider implementation of certain federal regulatory standards—this Court emphasized that PURPA required mere consideration, rather than outright adoption of the federal scheme (456 US at 765-66):

> While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence" [citations omitted], and do not impair the ability of the States "to function effectively in a federal system." [citations omitted.]

Similar concerns were expressed in *Hodel v Virginia Surface Mining & Recl. Assn.,* 452 US 264 (1981), in which this Court reviewed the Surface Mining Control and Reclamation Act of 1977, which empowered the Department of the Interior to promulgate and enforce guidelines for the

nationwide regulation of surface coal mining. Under that Act, States were afforded the opportunity to operate their own regulatory programs so long as such programs complied with federal regulatory standards. 452 US at 268-72. In upholding the Act's provisions against Tenth Amendment challenge, this Court distinguished the establishment of federal minimum regulatory standards upon private activity in the States from the imposition of affirmative and unavoidable regulatory obligations upon state governments (452 US at 288):

> [T]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

This Court's opinions in both *Hodel* and *FERC*, therefore, suggest that congressional imposition of a federal regulatory scheme through unwilling state action was, standing alone, constitutionally suspect under the Tenth Amendment. That view was also expressed in opinions by three Courts of Appeals more than a decade ago.[6] While this

[6]*See, e.g., Maryland v EPA*, 530 F2d 215 (4th Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v Brown*, 431 US 99 (1977) (*per curiam*) (EPA regulations compelling states to establish and fund automobile inspection programs, under penalty of criminal and civil sanctions upon non-complying states, violate Tenth Amendment); *Brown v EPA*, 521 F2d 827 (9th Cir 1975), *vacated and remanded for consideration of mootness*, 431 US 99 (1977) (*per curiam*) (same); *District of Columbia v Train*, 521 F2d 971 (D.C. Cir 1975), (Footnote continued on next page.)

Court in *South Carolina v Baker*, 485 US 505 (1988), left open the possibility that the teachings of *FERC* on this issue might to some degree have been subsumed by *Garcia* (485 US at 513), this Court did not address the issue as such because it was unnecessary to do so.[7]

In short, we believe that the courts below erred in their conclusion that this Court's opinion in *Garcia* barred substantive review of the 1985 Act under the Tenth Amendment. While the courts below may be correct in their view that the 1985 Act does not upset the "equality in dignity

(Footnote continued.)

vacated and remanded for consideration of mootness sub nom. EPA v Brown, 431 US 99 (1977) (*per curiam*) (same). *Contra, Pennsylvania v EPA*, 500 F2d 246 (3d Cir 1974). After the Supreme Court had granted certiorari in three EPA cases in 1976, the EPA rescinded some of the regulations at issue and conceded that others were invalid unless modified. Thus, the Court vacated and remanded without ruling on their constitutionality. 431 US at 103-04.

[7]The federal act challenged in *Baker*—section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)—removed federal income tax exemptions for interest earned on new bonds issued by state and local governments unless the bonds were issued in registered form. Designed to provide a strong incentive to encourage governments to issue registered bonds, this portion of the Act merely provided that bondholders of States which did not comply with the federal regulatory scheme would forfeit the tax benefits previously extended to them by the federal government. As the Court noted in response to the claim that the effect of TEFRA was to commandeer South Carolina's legislative process (485 US at 514-15, emphasis added):

> Such "commandeering" is . . . an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That *a State wishing to engage in certain activity* must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Unlike the 1985 Act, TEFRA did not compel an exercise of state sovereign power, or the legislative enactment of a new regulatory program.

and power" among the several States, we believe that the Act exceeds any proper "affirmative limits the constitutional structure might impose upon federal action affecting the States under the Commerce Clause" (469 US at 556), and warrants review by this Court. We further believe that, should it find that *Garcia* bars review of this matter, this Court should consider whether, in light of the danger to the federal system inherent in this new style of congressional regulation, this Court's opinion in *Garcia* should be reconsidered.

CONCLUSION

This Court should grant a writ of certiorari.

Dated: Albany, New York
September 27, 1991

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals, Second Circuit, Dated August 8, 1991

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 1511, 1512, 1513 August Term, 1990

(Argued: May 21, 1991 Decided: Aug. 8, 1991)

Docket No. 91-6031, 91-6033 & 91-6035

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, NEW YORK and THE COUNTY OF CORTLAND, NEW YORK,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and RICHARD THORNBURGH, as United States Attorney General,

Defendants-Appellees,

STATE OF WASHINGTON; STATE OF NEVADA; and STATE OF SOUTH CAROLINA,

Intervenors-Appellees,

AMERICAN COLLEGE OF NUCLEAR PHYSICIANS; ARIZONA PUBLIC SERVICE COMPANY; BALTIMORE GAS & ELEC-

TRIC COMPANY; CALIFORNIA RADIOACTIVE MATERIALS MANAGEMENT FORUM, INC.; COMMONWEALTH EDISON COMPANY; FLORIDA POWER & LIGHT COMPANY; GULF STATES UTILITIES COMPANY; MALLINKRODT MEDICAL, INC.; PACIFIC GAS & ELECTRIC CO.; PUBLIC SERVICE COMPANY OF COLORADO; SOCIETY OF NUCLEAR MEDICINE; SOUTHERN CALIFORNIA EDISON CO.,

Amici Curiae.

Before: MESKILL, PIERCE and MCLAUGHLIN, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*), dismissing a civil complaint seeking declaratory judgment. 28 U.S.C. §§ 2201, 2202.

Held: Under *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, does not violate state sovereignty protected under the Tenth Amendment and related principles of federalism.

AFFIRMED.

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in support of Appellees.

McLaughlin, *Circuit Judge:*

Plaintiffs-appellants appeal from a judgment entered in the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge),* dismissing a civil complaint seeking declaratory relief. 28 U.S.C. §§ 2201, 2202. The district court found that the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, was not an impermissible affront to state sovereign immunity protected under the Tenth Amendment, and that, absent unequal treatment accorded to the State of New York or a defect in the federal political process, Supreme Court precedent precludes further judicial review of the federal statute. The district court also found no Eleventh Amendment violation and dismissed plaintiffs' remaining challenges as meritless.

For the reasons set forth, we affirm.

BACKGROUND

More than thirty years ago, Congress sought to engage the states in a partnership venture that would recognize the interests of the several states in the peaceful uses of nuclear energy. Pub. L. No. 86-373, § 1, 73 Stat. 688, codified as amended 42 U.S.C. § 2021. *See English v. General Elec. Co.,* 110 S. Ct. 2270, 2276 (1990) ("In 1959, Congress amended the Atomic Energy Act in order to 'clarify the respective responsibilities . . . of the States and the [Federal Government]' . . . and generally to increase the States' role."). Under the Atomic Energy Act, the Atomic Energy Commission, predecessor to the Nuclear Regulatory Commission ("NRC" or "Commission"), was authorized to make agreements with the Governor of any state "providing for discontinuance of the regulatory authority of the Commission" with respect to enumerated nuclear materials and byproducts. 42 U.S.C. § 2021(b).

In 1959, an advisory committee formed at the behest of Governor Nelson A. Rockefeller recommended that New York execute an agreement with the Commission to have the State assume all regulatory control possible under federal law. It should be noted, too, that the advisory committee also recommended at that early date that the State establish a site to store radioactive waste, in part, "to encourage the growth of the atomic industry within the state." Even before the advisory committee's report was issued, the New York State Legislature passed the 1959 Atomic Energy Act, *see* 1959 N.Y. Laws Ch. 41, declaring it to be the State's policy to encourage "development and use of atomic energy for peaceful purposes." New York became a so-called "agreement state" under the federal scheme by 1962. 27 Fed. Reg. 10, 419 (1962).

A concern, universally acknowledged, that has accompanied the expansion of the nuclear industry is the storage

and disposal of low-level radioactive waste ("LLRW") such as contaminated waste from nuclear reactors, hospitals, research laboratories and pharmaceutical companies. During the 1970's, disturbing problems surrounding safe LLRW disposal reached mammoth proportions and commanded immediate congressional attention. As late as 1978 only three states—Washington, Nevada, and South Carolina—had established sites for LLRW operations; the rest of the country transported radioactive waste to these locations—with obvious risks.

The problem worsened dramatically when Washington and Nevada temporarily closed their sites because of improper handling, transportation and packaging of LLRW, shifting an already herculean task onto the lonely shoulders of South Carolina's Barnwell site. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 17, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974, 3006. Understandably vexed that sister states were not bearing a fair share of the disposal burden, Washington voters approved a 1980 initiative to ban in-state disposal of LLRW generated outside Washington State. While that initiative was struck as unconstitutional, *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978)), *cert. denied*, 461 U.S. 913 (1983), it demonstrated that the LLRW problem was fast becoming acute.

Congress turned its attention to these problems but, at the states' request, and in the interest of federalism, deferred action to allow the formulation of state-based and state-created proposals. 1985 U.S. Code Cong. & Admin. News at 3007. The National Governors' Association (NGA) spearheaded the effort with a Task Force to review and formulate a coordinated policy on the LLRW issue. Other state-based associations, including the National Conference of State Legislatures and the President's State Planning Council on Radioactive Waste Management, joined

the effort. *Id.* Because, in the eyes of the NGA, disposition of low-level waste was largely a state responsibility, the Task Force's first recommendation to Congress was that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders, except for waste generated at federal government facilities." Accordingly, the NGA invited Congress to enact legislation that would (1) authorize states to form interstate regional compacts; (2) eventually allow compact regions to exclude LLRW generated outside the region; and (3) provide for the safe interim storage of LLRW.

Congress complied by enacting the Low-Level Radioactive Waste Policy Act of 1980. 42 U.S.C. §§ 2021b-2021d (the "1980 Act"). Subject to congressional consent, states were authorized to form regional compacts and, after January 1, 1986, to refuse waste generated outside these established regions. Many states apparently progressed toward the establishment of regional compacts (or individual "go it alone" in-state disposal sites), but the original target date of January 1986 proved unrealistic. The three states that were accepting LLRW, disquieted with frustration, again looked to Congress. The NGA again stepped in to forge a state-based consensus and negotiated a seven-year extension, or "transition package" with the three sited states, buying more time for the regional solutions to become operable. 1985 U.S. Code Cong. & Admin. News at 3008.

Acting on this consensus, Congress adopted elaborate amendments to the 1980 Act, enacting the Low-Level Radioactive Waste Policy Amendments Act of 1985. 42 U.S.C. § 2021b-2021j ("1985 Amendments"). The 1985 Amendments set out a detailed schedule of deadlines ending on January 1, 1996, set forth periodic milestones for site development, and impose various penalties and surcharges for noncompliance. The penalty that has raised the most hackles is the "take title" provision: states that do not

comply "shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred . . . as a consequence." 42 U.S.C. § 2021e(d) (2) (C).

New York has not joined a regional compact. Choosing instead to "go it alone," New York enacted legislation effective July 26, 1986: (1) promulgating standards for site selection; (2) creating a commission to select a site; and (3) authorizing the construction of a LLRW disposal site. *See* 1986 N.Y. Laws Ch. 673. As of 1989, New York, in full compliance with the 1985 federal amendments, has certified that it will be able to store, manage, or dispose of its LLRW after January 1, 1993. *See* N.Y. Pub. Auth. Law § 1854-c (McKinney Supp. 1991). To date, New York's commission has designated five potential storage sites in New York, three in Allegany County, two in Cortland County.

In February 1990, the State of New York, joined by the Counties of Allegany and Cortland, brought an action in the United States District Court for the Northern District of New York seeking to declare the 1985 Amendments unconstitutional. They claim that the 1985 Amendments violate the Tenth[1] and Eleventh[2] Amendments, as well as the due process clause of the Fifth Amendment[3] and the

[1]The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

[2]The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

[3]The due process clause of the Fifth Amendment provides that no person shall:

> be deprived of life, liberty, or property, without due process of law;

U.S. Const. amend. V.

guaranty clause of article IV of the United States Constitution.[4] The States of Washington, Nevada and South Carolina, intervening by right, Fed. R. Civ. P. 24(a), joined the federal defendants to uphold the 1985 Amendments. A legion of utility companies, medical groups, and the like also sought to intervene. Their motions were denied, although they were permitted to file a brief as *amici curiae* in support of the intervenors and the federal defendants.

All parties moved or cross-moved for summary judgment. Fed. R. Civ. P. 56(c). In addition, the intervenors joined in defendants' motion to dismiss the complaint. Fed. R. Civ. P. 12(b)(6). After oral argument, the district court read into the record a decision dismissing the complaint. *New York v. United States,* 757 F. Supp. 10 (N.D.N.Y. 1990).[5] The district court held that the 1985 Amendments

[4]The guarantee clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

[5]In its written opinion, the district court noted, "[a]t this juncture all parties have moved for summary judgment, and there appear to be no issues of material fact, and the case therefore appears ready for summary treatment by the Court." 757 F. Supp. at 11. The court, however, went on to grant the government's motion to dismiss the complaint. *Id.* at 13; *see* Fed. R. Civ. P. 12(b)(6). It is uncontested that the district court considered documentary evidence and affidavits. Accordingly, we treat the appeal as one from the grant of summary judgment. *Grand Union Co. v. Cord Meyer Dev. Corp.,* 735 F.2d 714, 717 (2d Cir. 1984). In reviewing *de novo* and considering the record in the light most favorable to appellants, we nonetheless fully agree with the court below that there exists no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986); *Delaware & Hudson Ry. v. Consolidated Rail Corp.,* 902 F.2d 174, 177-78 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 2041 (1991). That said, we review whether the law was correctly applied. *National Union Fire Ins. Co. v. Turtur,* 892 F.2d 199, 203 (2d Cir. 1989); *City of Yonkers v. Otis Elevator* Co., 844 F.2d 42, 45 (2d Cir. 1988) (citing 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2716, at 654 (2d ed. 1983)).

did not violate the Tenth and Eleventh Amendments, and similarly dismissed plaintiffs' claims under the guaranty clause (and, implicitly, the due process clause), finding such claims "inextricably intertwined with the position just made in this decision, and those claims are accordingly dismissed." *Id.* at 13.

Plaintiffs appeal, reiterating the claim that the 1985 Amendments trench upon state sovereign immunity, but they do not press a due process claim on appeal. *See generally South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (states are not "persons" within the meaning of the due process clause and, thus, are not protected by it); *Alabama v. EPA*, 871 F.2d 1548, 1554 (11th Cir.) (state which has toxic waste disposal site has no Fifth Amendment due process right and, therefore, cannot allege defective notice by the EPA), *cert. denied*, 110 S. Ct. 538 (1989).

DISCUSSION

More than a decade ago, the Supreme Court declared that "[n]uclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978). Thus, appellants undertake an unusually burdensome task to persuade us that federal disposal site control legislation impinges impermissibly upon state sovereignty. Indeed, one circuit court has already said, "that the [Atomic Energy] Act violates the Tenth Amendment has little basis for support. Congress, through its power to regulate interstate commerce and provide for the national defense and general welfare, clearly can enact legislation governing the use of nuclear energy." *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981). We are called upon

to review the 1985 Amendments to that same Atomic Energy Act; the amendments are designed to ensure state compliance with a plan for safe LLRW disposal.

The 1985 Amendments declare that, in addition to certain classes of nuclear waste generated by the federal government,

> Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—
>
> (A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983.

42 U.S.C. § 2021c(a)(1). If a state fails to properly dispose of LLRW, certain penalties ensue:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021c(d)(2)(C).

It is this penalty provision that triggers the most vigorous constitutional challenges.

Appellants' first contention is that the 1985 Amendments violate the Tenth Amendment. Tenth Amendment analysis must now begin with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), where the Supreme Court instructed us that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552 (overturning *National League of Cities v. Usery*, 426 U.S. 833 (1979)). In the intervening years, the Supreme Court has emphasized that the judicial role in evaluating Tenth Amendment challenges is narrowly cabined. *See South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* holds that the limits are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."); *see also* Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 72 (1989) ("In *Garcia*, five justices joined in a majority opinion that, in effect, concluded that if states desire to preserve any aspect of their sovereignty within the federal system they must look to Congress, and not to the courts."); *The Supreme Court, 1987 Term—Leading Cases*, 102 Harv. L. Rev. 143, 228 (1988) (*Baker* "unequivocally repudiat[es] the suggestion that the tenth amendment requires any substantive or qualitative analysis of the national political process").

It is self-evident that virtually every congressional exercise of power under the commerce clause will limit state power over that commerce and, to that extent, will invite state objections under the Tenth Amendment. As the *Garcia* Court observed:

> The fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Garcia, 469 U.S. at 554. (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). Other circuits, including ours, have employed the *Garcia* analysis. *See, e.g., Nevada v. Watkins*, 914 F.2d 1545, 1556 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991); *EEOC v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990) (noting that the "*Garcia-Baker* standard is a very high one"). Quite simply, "[w]ith rare exceptions, . . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia*, 469 U.S. at 550.

Perusing the legislative history of the 1985 Amendments, the conclusion is inescapable that, rather than discovering defects in the political process, both the 1980 Act and its 1985 Amendments are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics. *See* Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437, 474 (1987) [hereinafter *Waste Wars*] ("Th[e] extensive state involvement [in the 1980 federal act and 1985 federal amendments] produced substantial benefits for all the states, strongly suggesting that state sovereignty received adequate protection."). With both statutes, the Congress acted only after robust debate and a clearly articulated acceptance of NGA and other state-based recom-

mendations. New York's senior Senator, urging adoption of the final version of the proposed amendments, proclaimed:

> New Yorkers will continue to light some of their lights with nuclear electricity—and their doctors will continue to use life-saving laboratory tests that depend on the use of radioactive materials. So will the citizens of South Carolina—and they will be able to watch New York, and the rest of the Nation, make their own arrangements to dispose of their own low-level radioactive wastes.

131 Cong. Rec. S38,423 (daily ed. Dec. 19, 1985) (statement of Senator Moynihan).

Turning specifically to the penalty provision that New York finds so offensive, we reject appellants' allegation that the "take title" provision, which they classify as a last-minute amendment to the House bill added to placate Senate demands, is the product of a grievous defect in the political process. They complain that this provision was not subject to timely scrutiny and committee debate. There is an irony in this grumbling when it is recalled that the Senate Environment and Public Works Committee was the author of the take title provision; it numbers among its members Senator Moynihan of New York. *See also Waste Wars,* 11 Harv. Envtl. L. Rev. at 458 ("The House nonetheless accepted the taking title provision by unanimous vote."). In any event, appellants misperceive the issue. "The political process ensures that laws that unduly burden the States will not be promulgated." *Garcia,* 469 U.S. at 556. *See Watkins,* 914 F.2d at 1556-57 ("[T]he tenth amendment does not protect a State from being outvoted in Congress. . . . Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process."); *EEOC v. Vermont,* 904 F.2d at 802 ("In any event, the absence of a given legislator or legislators, so long as the legislative body's appropriate procedural rules have been followed, does not mean that the national process leading to the enactment of a given piece of legislation was flawed.").

Appellants raise an alternative objection to the take title provision. Noting that *Garcia* cited *Coyle v. Smith,* 221 U.S. 559 (1911), appellants argue that, even after *Garcia,* the Tenth Amendment imposes *some* substantive limitations upon federal power; and they conclude that the take title provision falls within that forbidden zone. We are not persuaded.

In *Coyle,* the Congress sought to condition Oklahoma's admission into the Union upon Oklahoma's agreement to locate, at least initially, its capital in Guthrie and accept certain limitations upon the State's power to change its seat of government. The Supreme Court found such conditions to be a palpable violation of the Tenth Amendment. *See Coyle,* 221 U.S. at 565 (that a state's power to locate its own seat of government "could now be shorn. . . by an act of Congress would not be for a moment entertained").

In testing the waters surrounding *Garcia*'s laconic reference to *Coyle,* the district court perceptively noted that the Supreme Court's central concern in *Coyle* was "equality in dignity and power" among the several states, 221 U.S. at 568, a concern clearly not at issue here where the motivating engine of both the 1980 Act and 1985 Amendments is identical treatment for all states.

It should also be noted that formal transfer of title to nuclear waste, although usually effected by contract, is not uncommon. *See General Elec. Uranium Management Corp. v. United States Dep't of Energy,* 764 F.2d 896, 898 (D.C. Cir. 1985) (Secretary authorized to contract with persons who generate or hold title to nuclear waste, for the transfer of title to the Department of Energy); *Commonwealth Edison Co. v. Allied-General Nuclear Servs.,* 731 F. Supp. 850, 856 (N.D. Ill. 1990) (contingency clause in contract

between private nuclear generator and private nuclear reprocessing plant requiring the latter, upon noncompliance, to accept title to nuclear waste).

In sum, we are satisfied that the take title provision does not undermine the constitutional structure. Neither does it violate principles of federalism as recently explained in *Garcia*; and "[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Baker,* 485 U.S. at 513 (emphasis in original); *see generally International Assoc. of Firefighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 821 (10th Cir. 1989) (absent agreement between state agency and employees, the Fair Labor Standards Act does not violate the Tenth Amendment by compelling state to compensate employees with overtime pay rather then compensatory time); *Metropolitan Transp. Auth. v. ICC,* 792 F.2d 287, 298 (2d Cir.) (Rail Passenger Service Act, requiring the MTA to "permit the operation of Amtrack trains over its lines" does not violate the Tenth Amendment under *Garcia* or conscript the state to act in a way that unconstitutionally promotes a federal policy), *cert. denied,* 479 U.S. 1017 (1986).

Appellants, most notably Allegany County, strive to offer alternative grounds for declaring the 1985 Amendments unconstitutional. We are satisfied, however, that the 1985 Amendments do not violate the Eleventh Amendment. *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 14 (1989) (plurality opinion reasoning "that Congress' authority to regulate commerce includes the authority directly to abrogate States' immunity from suit"); *see id.* at 57 (White, J., concurring) (agreeing "with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States"); *see also National Foods, Inc. v. Rubin,* No. 91-7084 slip op. 5039, 5043 (2d Cir. June 12, 1991) ("The Eleventh Amendment has been interpreted to render states absolutely immune

from suit in federal court unless they have consented to be sued in that forum or unless Congress has overridden that immunity by statute."); *Russell v. Dunston,* 896 F.2d 664, 667 (2d Cir.) (citing *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976)), *cert. denied,* 111 S. Ct. 50 (1990). Similarly, we agree with the district court that appellants' argument, anchored in the guarantee clause of article IV, that there is a deprivation of a republican form of government, is analytically indistinct from the arguments supporting sovereign immunity under the Tenth Amendment. *See Baker,* 485 U.S. at 511 n.5 ("We use 'the Tenth Amendment' to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.").

CONCLUSION

We have considered appellants' remaining arguments, but find them without merit. We conclude, therefore, that the 1985 Amendments pass constitutional muster. Accordingly, we affirm.

Opinion of the United States District Court for the Northern District of New York, Dated December 7, 1990

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al,*

Plaintiff,

against

UNITED STATES OF AMERICA,

Defendant.

90-CV-162

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December 7, 1990

CON. G. CHOLAKIS, D.J.*

It is my intention at this time to read a decision into the record. I know that it may seem very unusual that a decision will be read into the record on a matter that is as

*The transcript of this opinion, delivered from the bench, has been edited for grammatical construction, organization of quotations, and augmentation of citations.

complex and involved as this case obviously is. I do not want any of the participants to think that their positions have not been given due weight. We have spent an extraordinary amount of time on this one case in the past two weeks. As a matter of fact, I dare say we have spent as much time on this single case as we have spent on any other three or four cases combined during the last three or four years.

I do think, however, that in fairness to all the participants that a decision be made as quickly as possible so those parties involved can make a determination as to their future course of action. And I do not feel that just letting this matter sit for any length of time will do justice to the parties or to the Act itself. I have listened to all of the arguments presented by all of the attorneys, and I think I have given you relatively free reign because I was waiting to see if anyone could say anything that would change the feeling that the Court had about this subject after reading all of the papers, and as you know, the papers were voluminous. As a matter of fact, if I could sell them by the pound, I think I'd be in very good shape.

The plaintiffs State of New York and the Counties of Allegheny and Cortland challenge the constitutionality of the Low Level Radioactive Waste Policy Act Amendments of 1985, 42 U.S. Code Sections 2021 *et seq*, on the grounds that the Act violates the Tenth and Eleventh Amendments as well as the Guaranty Clause and Due Process Clause of the United States Constitution.

Before the Court are numerous motions and cross-motions. At this juncture all parties have moved for summary judgment, and there appear to be no issues of material fact, and the case therefore appears ready for summary treatment by the Court.

The United States in its motions to dismiss and for summary judgment relies principally on the Supreme Court case of *Garcia v. San Antonio Metropolitan Transit Author-*

ity, 469 U.S. 528 (1985). This case calls into question the judiciary's ability and authority to consider challenges to Congressional power over the States. *Garcia* overturned *National League of Cities v. Usury,* 426 U.S. 833 (1976), in which the Supreme Court proclaimed that the Tenth Amendment limited Congressional power to legislate under the Commerce Clause. The Court concluded in *National League* that the Tenth Amendment sheltered "the states' freedom to structure integral operations in areas of traditional governmental functions". Accordingly, Congress could not displace the states' freedom by regulating "the states as states" and limiting the attributes of state sovereignty. *Id.* at 552-554

In *Garcia,* a sharply divided Court rejected *National League,* concluding:

> In short, the framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of national government itself rather than in the discrete limitations on the objects of federal authority. State sovereign interests, then are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Garcia, 469 U.S. at 552.

The Court in *Garcia* ruled that judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to an inquiry of whether the political process has failed. The Court did, however, indicate that some additional limits might exist on Congressional action based on "the constitutional structure". The *Garcia* court, however, did not define or identify these limits apart from citing without discussion the 1911 Supreme Court case of *Coyle v. Oklahoma,* 211 U.S. 559.

The citing of the *Coyle* case is significant. The *Coyle* case struck down a Congressional enactment which conditioned the statehood of Oklahoma on the placement of the state capital at a certain location. The Court acknowledged at page 565 of that opinion that "the power to locate its own seat of government was essentially and peculiarly [a] state power". The holding in *Coyle,* however, is clearly based on the finding that Oklahoma was being forced to do something which no other state was being forced to do; that being to locate her capital according to the wishes of Congress.

The *Coyle* Court stated in the last paragraph of its opinion on page 58 the following:

> The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears, we may remain a free people, but the Union will not be the Union of the Constitution.

Therefore, this Court reads *Garcia* as allowing judicial interdiction of federal powers over the states in the following areas: One, when that power is the result of a defect in the political process, and two, possibly when constitutional equality among the states has been jeopardized.

Garcia and the 1988 Supreme Court decision *South Carolina v. Baker,* 485 U.S. 505 (1988), foreclose, in this Court's view, judicial review of any Congressional action over the states which is validly enacted and equally applied to all states. Any review of the substantive merits of such an action apart from an inquiry into the "constitutional equality" of the action would require a judicially determined definition of the contours of state sovereignty. This Court is barred by *Garcia* from making such a definition.

The United States argues that there was no defect in the political process in the passage of the Act and that no other judicial challenge may be made pursuant to *Garcia*. Plaintiff Cortland County argues that several political process defects exist which should invalidate the law.

First, Cortland County argues that a lack of political accountability of Congress as regards this Act is a signal that the political process has failed. Cortland's argument is that Congress has passed a law which puts burdens on the states to pass certain unpopular laws. The political "heat" as well as the fiscal burden are then absorbed by the states rather than by Congress, the truly responsible party. Cortland also presents a second political defect theory in which the Congress is portrayed as being controlled by political action committees who have neutralized states' interests and influence.

Taking Cortland's second argument first, it is clear that the pervasiveness of political action committees in Congress is not the type of systemic breakdown envisioned by the *Garcia* court. This argument is really nothing less than an indictment of how the political system works. According to *Garcia*, the proper remedy is not judicial intervention but the rejection by voters of those representatives who are beholden to the special interest groups. The "built-in restraints that our system provides" will presumably correct this perceived problem. Therefore, Cortland's position is, in this Court's view, without merit.

Cortland's argument concerning political accountability is similarly lacking in legal foundation. In the *South Carolina v Baker* case, the Supreme Court declined to define what was meant by "political defects" but did characterize the terms as referred to "extraordinary defects in the national political process". *Baker*, 485 U.S. at 515. The Court in its discussion cited to a footnote contained in the 1938 Supreme Court case of *United States v Carolene Products*, 304 U.S. 144, 152 n. 4.

The Court interprets this authority as meaning that the "political process tests" referred to problems which may have had an untoward effect on a particular law's enactment or its subsequent political review. If the law is validly enacted, it may not thereafter be judicially challenged on political process grounds unless the effect of the law restricts a state from continuing meaningful political participation, where a state is foreclosed from challenging the law politically. In other words, the political process rationale for judicial intervention only arises when the legislative/political avenue has been functionally closed.

Such is not the case here. Nothing in the Act restricts New York's, or any other state's, ability to operate in the political arena and to challenge the law. This is not, in this Court's view, the type of political breakdown or type of extraordinary situation the Supreme Court envisioned as requiring judicial intervention. Therefore, this Court rejects any challenge to the Act based on the so-called "political process defect" test.

New York State argues that *Garcia* left open another path of attack other than the political process test. The State, joined by the other plaintiffs, argues that the Court still has the power to rule that particular laws destroy state sovereignty.

As just explained, this Court does not see how such an argument may be sustained and be consistent with *Garcia*.

Plaintiffs do not allege that New York State is being treated inequitably with other States. The State's argument, reduced to its essence, would require this Court to dictate a sacred province of state autonomy, and this, in this Court's judgment, would violate the *Garcia* holding. In this Court's view, any claims under the Guaranty Clause are inextricably intertwined with the position just made in this decision, and those claims are accordingly dismissed.

The claims under the Eleventh Amendment are likewise dismissed pursuant to the Supreme Court holding in *Pennsylvania v Union Gas*, 491 U.S. 1 (1989).

This Court is aware that the *Garcia* case was decided by a divided court, that the make-up of the Court has since changed, and that the *Garcia* doctrines may not survive. In fact, it may well be this case which results in *Garcia* being overturned. While this Court has problems with the *Garcia* holding, it is nonetheless constrained by the precedents which it reads as residing therein.

The defendant United States' motion to dismiss the complaint is therefore granted in all respects. I believe I have an appropriate order which will be signed and in all probability will be filed today. Thank you ladies and gentlemen.

Judgment of the United States District Court for the Northern District of New York, dated December 26, 1990.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK

vs.

THE UNITED STATES OF AMERICA; WATKINS, JAMES D., as Secretary of Energy; CARR, KENNETH M., as Chairman of the U.S. Nuclear Regulatory Commission; THE U.S. NUCLEAR REGULATORY COMMISSION; SKINNER, SAMUEL K., as Secretary of Transportation; and THORNBURGH, RICHARD, as U.S. Attorney General, *et al.*

Case Number: 90-CV-162.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendants' Motion to Dismiss is Granted and all claims against Defendants are dismissed with prejudice.

Dated: December 26, 1990

GEORGE A. RAY
Clerk

MARY ANN FRANCISCO
(By) Deputy Clerk

(5) (3) (2)

Nos. 91-543, 91-558 and 91-563

Supreme Court, U.S.
FILED
DEC 6 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF ALLEGANY, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF CORTLAND, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the requirement under the Low Level Radioactive Waste Policy Act Amendments of 1985 that the State of New York, acting either alone or in cooperation with other States, provide disposal capacity for low-level radioactive waste generated within its borders is consistent with the Tenth Amendment and related constitutional principles of federalism.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-543

STATE OF NEW YORK, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 942 F.2d 114. The opinion of the district court (Pet. App. 18a-26a) is reported at 757 F. Supp. 10.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1991. The petitions for a writ of certiorari were filed on September 30, 1991 (No. 91-543) and October 3, 1991 (Nos. 91-558 and 91-563). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b-2021i, creates incentives for States to comply with a federal requirement that States ensure the availability of adequate disposal capacity for certain classes of low-level radioactive waste (LLRW) generated within their borders.[2] The 1985 Act represents Congress's attempt,

[1] "Pet. App." refers to the appendix to the certiorari petition in No. 91-543. "C.A. App." refers to the joint appendix in the court of appeals.

[2] The 1985 Act and the relevant NRC regulations define LLRW as radioactive waste other than "high-level radioactive waste, spent nuclear fuel, or byproduct material (as defined in section 2014(e)(2) [of Title 42, which refers to uranium and thorium tailings and wastes])." 42 U.S.C. 2021b(9); see 10 C.F.R. 61.2. Generally, LLRW consists of radioactively contaminated materials from commercial reactors, hospitals, research institutions, and industrial sites.

Under the 1985 Act, States are responsible only for LLRW that falls within the 1983 definitions adopted by the Nuclear Regulatory Commission (NRC) for Class A, B and C wastes. See 42 U.S.C. 2021c(a)(1) (citing 10 C.F.R. 61.55 (1983), which classified LLRW based on types and concentrations of radionuclides). The 1985 Act makes the federal government responsible for LLRW with radioactivity levels in excess of the Class C concentration of isotopes and for most Class A, B, and C waste generated by the federal government. See 42 U.S.C. 2021c(b)(1).

devised in cooperation with the States, to reinvigorate the state-oriented approach to disposal of LLRW that had been established by the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347, which Congress also had developed in cooperation with the States. The 1980 and 1985 Acts assigned the States primary responsibility for ensuring the availability of sufficient disposal capacity for LLRW generated within their borders. In exchange, they afforded States significant control over the location and operation of disposal facilities, including the authority, as members of multi-state compacts, to exclude out-of-compact waste from their LLRW disposal facilities.

In February 1990, the State of New York, together with its Counties of Cortland and Allegany, filed suit in the United States District Court for the Northern District of New York, seeking a declaratory judgment that the 1985 Act violates the Tenth and Eleventh Amendments of the United States Constitution, as well as the Guaranty Clause of Article IV, Section 4. The district court rejected those challenges, Pet. App. 18a-26a, and the court of appeals affirmed, *id.* at 1a-17a.

1. Congress enacted the 1980 and 1985 Acts in response to interstate tensions over LLRW disposal that threatened to close off access to disposal facilities for LLRW generators in States that did not have such facilities. Closings of three commercial

LLRW disposal facilities during the 1970s left the Nation with only three operational facilities—one each in Nevada, South Carolina, and Washington. Following a series of packaging and transportation accidents in 1979, Nevada and Washington ordered temporary shutdowns at the facilities within their borders, and South Carolina ordered a 50% reduction in LLRW accepted by the facility subject to its regulatory control. H.R. Rep. No. 314, 99th Cong., 1st Sess. Pt. 2, at 17-18 (1985); H.R. Rep. No. 1382, 96th Cong., 2d Sess. Pt. 2, at 25 (1980); 126 Cong. Rec. 20,135-20,136 (1980) (remarks of Sen Thurmond); C.A. App. 236. In light of growing public opposition to continued LLRW shipments from other States,[3] all three States announced their intentions to implement permanent shutdowns. C.A. App. 308, 321; Pet. App. 6a.

In response to these developments, Congress initially considered a proposal to construct LLRW disposal sites on federal land.[4] However, Congress deferred action at the request of the three States that already had disposal sites. A task force headed by seven governors, working under the auspices of the National Governors' Association (NGA), proposed a "state solution" to the LLRW problem, which was then presented to Congress with the unanimous support of the NGA's members. National Governor's Ass'n, *Low Level Waste: A Program for Action* (Nov. 1980) (C.A. App. 232-263); see H. Brown, NGA Center for Policy Research, *Low-Level Waste Handbook* iii (1986).[5] The NGA recommended federal legislation that would assign the States primary responsibility for ensuring adequate capacity for LLRW disposal and allow States to meet that responsibility either on their own or in cooperation with other States as members of interstate compacts. C.A. App. 241-243; see Pet. App. 6a-7a. The NGA further recommended that Congress encourage compact formation by granting approved compacts a waiver of the Commerce Clause's prohibition against state-created restrictions on interstate waste shipments. C.A. App. 242; see *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978).

The 1980 Act incorporated the States' principal recommendations. It declared a federal policy that each State is "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and that LLRW can be managed "most safely and efficiently * * * on a regional basis." Pub. L. No. 96-573, § 4(a)(1), 94 Stat. 3348. The 1980 Act also encouraged States to enter into regional compacts by authorizing approved compacts, beginning in 1986, to restrict their facilities "to the disposal of low-level radioactive waste generated within the region." § 4(a)(2)(B), 94 Stat. 3348. But Congress declined for the time being

[3] See, *e.g.*, *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 630-632 (9th Cir. 1982) (striking down, on Commerce Clause grounds, a Washington law, enacted by referendum, to exclude shipments of LLRW from other States), cert. denied, 461 U.S. 913 (1983).

[4] See *Low-Level Nuclear Waste Burial Grounds: Hearing Before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology*, 96th Cong., 1st Sess. 2 (1979) (remarks of Rep. McCormack).

[5] Congress received similar recommendations from the National Conference of State Legislatures and the State Planning Council on Radioactive Waste Management. H.R. Rep. No. 314, *supra*, Pt. 2, at 18.

to enact proposals in pending bills to impose sanctions as incentives for States to create intrastate or intra-compact disposal capacity—*e.g.*, cancellation of NRC licenses in non-conforming States or a prohibition against interstate shipment of LLRW unless made pursuant to an interstate compact. The NGA recommended against such sanctions because it concluded that they were unnecessary at that time. See C.A. App. 243.

2. By 1985, it had become clear that the objectives of the 1980 Act would not be met. Although seven proposed compacts had been submitted to Congress for approval, only three (the ones formed around the three sited States) had operational disposal facilities. See H.R. Rep. No. 314, *supra*, Pt. 2, at 18. If Congress had approved those three compacts, generators in 31 States—including many hospitals and research institutions that had little on-site storage capacity—could have been left with no outlet for their wastes. *Id.* at 18, 57.[6] The Governors of the three sited States, when confronted with the indefinite continuation of what they regarded as an inequitable distribution of disposal burdens, once again threatened to shut off or severely limit access to the Nation's only three commercial LLRW disposal facilities. *Id.* at 18-19.[7] Fearing a "nationwide crisis" if the problem was not

[6] See also 131 Cong. Rec. 38,404 (1985) (remarks of Sen. Hart); *id.* at 38,421 (remarks of Sen. Mitchell).

[7] See also S. Rep. No. 199, 99th Cong., 1st Sess. 3-4 (1985); *Low-Level Radioactive Waste: Hearings on H.R. 862, H.R. 1046, H.R. 1083, H.R. 1267, H.R. 2062, H.R. 2635 and H.R. 2702 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 150, 161-162 (1985) (testimony of South Carolina Governor Richard W. Riley).

resolved, Congress revisited the 1980 Act to strengthen incentives for the creation of new disposal capacity. See S. Rep. No. 199, 99th Cong., 1st Sess. 4 (1985).

Representatives of sited and non-sited States reconvened, again under the auspices of the NGA, to develop a legislative proposal for resolving the crisis without sacrificing the States' determination to retain authority over the siting and operation of LLRW disposal facilities. This group played a key role in the formulation of H.R. 1083, which formed the basis for the 1985 Act. Pet. App. 7a.[8] The bill, according to Representative Udall, its lead sponsor, was "primarily a resolution of the conflicts between the States that do not have disposal capacity, and the three other States that have capacity." 131 Cong. Rec. 35,203 (1985). New York supported the effort to reinvigorate the "state solution": one of its officials—recognizing that New York was "highly likely to be a host State," in light of its size and waste volume—supported congressional efforts to resolve the impasse, including adoption of "specific and easily identifiable milestones" for States to meet, backed by "[a]ppropriate penalties * * * for failure to meet these milestones."[9] And Senator Moynihan of New York spe-

[8] See C.A. App. 310-311, 323-324; see also 131 Cong. Rec. 35,204 (1985) (remarks of Rep. Udall) ("H.R. 1083 represents the diligent negotiating undertaken by that group. The fundamentals of their settlement are embodied in the bill we are bringing to the floor today.").

[9] *Low-Level Waste Legislation: Hearings on H.R. 862, H.R. 1046, H.R. 1083 and H.R. 1267 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 98, 198 (1985) (testimony of Charles Guinn, Deputy Commissioner for Policy & Planning, New York State Energy Office); see

cifically urged enactment of the legislation in its final form. See 131 Cong. Rec. 38,423 (1985).

The 1985 Act provides three types of incentives to encourage States to develop LLRW disposal facilities. First, the Act permits discrimination against LLRW imports, initially in the form of price discrimination by the original three sited States (or the compacts of which they are members), and later in the form of either price discrimination or outright bans by sited compacts.[10] These provisions renew and extend the 1980 Act's relaxation of Commerce Clause prohibitions against restrictions on interstate waste shipments.

Second, the 1985 Act provides for federal payments (from a fund financed by disposal surcharges) to States that meet a series of interim milestones toward ensuring adequate disposal capacity for LLRW gen-

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also *Low-Level Radioactive Waste Regional Compacts: Hearings on H.R. 1012, H.R. 3002 and H.R. 3777 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 264-267 (1983) (testimony of Eugene Gleason, Director of Policy Planning, New York State Energy Office) (expressing New York's support for allowing siting compacts to exclude out-of-state LLRW, provided that "interim access to existing facilities will be made available" to generators in non-complying States).

[10] Price discrimination by the three existing disposal facilities is subject to statutory limits until January 1, 1993. See 42 U.S.C. 2021e. Price discrimination and access restrictions by compact disposal facilities established after passage of the 1985 Act are limited only by the terms of the congressionally approved compacts. See 42 U.S.C. 2021d; see, *e.g.*, Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act of 1985, Pub. L. No. 99-240, Tit. II, § 221, Arts. IV(2) and V, 99 Stat. 1862-1863 (discrimination provisions of Northwest Interstate Compact).

erated within their borders by January 1, 1993. 42 U.S.C. 2021e(d)(1)-(2). New York has met the three milestones to date and has received its incentive payments.

Third, the Act contains an additional system of incentives to meet the milestones. Initially, LLRW generators in complying States are exempted from stiff disposal surcharges levied on their counterparts in non-complying States, 42 U.S.C. 2021e(e)(2)(A)(i) and (e)(2)(B)(i); later, those counterparts will lose ensured access to existing disposal facilities. 42 U.S.C. 2021e(a), (e)(2)(A)(ii) and (e)(2)(B)(ii). The States themselves then will be subject to direct incentives beginning in January 1996:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(C).[11]

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[11] States are expected to ensure adequate intrastate or intra-compact disposal capacity by January 1, 1993, but non-complying States can avoid responsibility for LLRW generated within their borders until 1996 simply by forfeiting incentive payments. 42 U.S.C. 2021e(d)(2)(C).

This so-called "take-title" provision originated with the Senate Committee on Environment and Public Works.[12] It was added to H.R. 1083, the bill produced by the House Committee in collaboration with the States, out of concern that direct incentives were necessary for the States to meet their responsibilities, and thereby prevent a repetition of the 1980 Act's failure.[13] The take-title provision was viewed as imposing a risk on non-sited States (albeit one that every State could prevent from materializing), in return for important benefits, "chief of which is the right [as a member of an approved compact] to exclude low-level radioactive waste not generated in the compact region from any disposal facility located within the region." 131 Cong. Rec. 38,415 (1985) (remarks of Sen. Johnston).

Although the 1985 Act contains precise deadlines and clear incentives, it preserves wide discretion to the States in deciding how their LLRW programs should be structured and administered. In the first place, States choose whether to meet their responsi-

[12] See 131 Cong. Rec. 38,414 (1985) (remarks of Sen. Johnston).

[13] See 131 Cong. Rec. 38,405-38,406, 38,414-38,416 (1985) (remarks of Sens. Hart and Johnston). The take-title provision was incorporated in a package of amendments to H.R. 1083 that was approved by the Senate, *id.* at 38,425, adopted by the House with modifications not relevant here, *id.* at 38,120, and reaffirmed as modified by the Senate, *id.* at 38,558. A variant of the take-title provision appeared in an earlier version of the House bill. See *Low-Level Radioactive Waste Disposal: Joint Hearing on S. 1517 and S. 1578 Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Senate Comm. on Env't and Public Works*, 99th Cong., 1st Sess. 574-577 (1985).

bilities alone or through participation in a regional compact. 42 U.S.C. 2021c(a)(1). Furthermore, States in which disposal facilities are located may leave the licensing and regulation of the facilities to the federal government or perform those functions themselves, pursuant to authority conferred by the established "agreement states" program under the Atomic Energy Act.[14] Sited States also choose whether to undertake the siting, construction and management of any disposal facility directly, or instead to contract for performance of those tasks by private firms. See C.A. App. 161.[15]

3. In 1986, the New York Legislature, having determined that the State could no longer "assume that other states will continue indefinitely to provide access to facilities adequate for the permanent disposal of low-level radioactive waste generated in New York," enacted legislation providing for the siting and financing of a LLRW disposal facility in New York.[16] New York opted for direct state administra-

[14] See 42 U.S.C. 2021 (authorizing withdrawal of federal regulatory authority over certain nuclear materials in favor of regulatory programs run by qualified States). New York was one of the first States to assume this regulatory role under the Act. See Pet. 12 n.5; 27 Fed. Reg. 10,419 (1962); C.A. App. 184-186.

[15] The 1985 Act also affords States and compacts flexibility in selecting from among disposal methods. See 42 U.S.C. 2021g (directing NRC to publish technical guidance on alternatives to shallow land burial); C.A. App. 166 (affidavit describing guidance).

[16] See 1986 N.Y. Laws, ch. 673, § 2, codified at N.Y. Envtl. Conserv. Law §§ 29-0101 note (McKinney Supp. 1991). The Legislature found this action "necessary to provide for continued operation of essential and beneficial medical, research, industrial, energy and other facilities in New York which use

tion of its program to ensure adequate disposal capacity.[17] That decision was consistent with New York's long history of active involvement in the nuclear field, as a promoter and regulator of the nuclear industry and as a large-scale generator of LLRW through its operation of two state-run nuclear power plants. See Pet. 12 n.5, 14; Pet. App. 5a-6a; C.A. App. 217-218, 292, 295, 300-305. New York has also chosen to act independently rather than join a compact.[18] Funding for these efforts is presently derived from assessments on nuclear power plants and federal payments received by New York for meeting the milestones set forth in the 1985 Act.[19] The state legislation directs that "[p]ermanent disposal facilities shall be completed and begin operation no later than [January 1, 1993]." N.Y. Pub. Auth. Law § 1854-c.3 (McKinney Supp. 1991).

In 1988, New York developed a list of five potential sites, two in Cortland County and three in Allegany County. Pet. App. 8a. Residents of the two Counties have opposed consideration of those sites. C.A. App. 32-33, 42, 68-76.

4. a. Petitioners filed this suit in February 1990, seeking a declaratory judgment that the 1985 Act vio-

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radioactive materials and generate low-level radioactive waste and to protect the public health and welfare of the people of the state of New York." *Ibid.*; see C.A. App. 117, 123, 136, 139, 142, 145, 148 (references to loss of access for New York generators in recommendations favoring New York bill).

[17] See N.Y. Envtl. Conserv. Law §§ 29-0301 to 29-0305, 29-0501 to 29-0503 (McKinney Supp. 1991); N.Y. Pub. Auth. Law 1854-c.3 (McKinney Supp. 1991).

[18] See *Low-Level Waste Legislation Hearings*, note 9, *supra*, at 197 (testimony of Charles Guinn).

[19] N.Y. Pub. Auth. Law § 1854-d.2.c (McKinney Supp. 1991).

lates the Tenth and Eleventh Amendments, as well as the Guaranty Clause of Article IV, Section 4. The district court granted summary judgment in favor of the United States.[20] The district court first rejected the contention that the 1985 Act violates the Tenth Amendment, finding that the Act was not the product of any defect in the political process and that New York had not been unfairly singled out for especially harsh treatment. Pet. App. 24a-25a. The court also summarily rejected petitioners' Eleventh Amendment argument, holding that the Eleventh Amendment operates as a restriction on judicial, not congressional, power. Pet. App. 25a (citing *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989)). Finally, the court dismissed petitioners' claims under the Guaranty Clause, finding them "inextricably intertwined" with their unmeritorious Tenth and Eleventh Amendment claims. *Ibid.*

b. The court of appeals affirmed, sustaining the 1985 Act (including its take-title provision) against petitioners' various constitutional attacks. Pet. App. 10a-17a. First, the court found that the national legislative process had operated properly in producing the 1980 and 1985 Acts, and that those Acts in fact "promot[ed] state and federal comity in a fashion rarely seen in national politics." *Id.* at 13a. The court found it significant that the purpose of the 1980 and 1985 Acts was to furnish "identical treatment for all states." *Id.* at 15a. For this reason, the court concluded that the Acts satisfy the central concern of *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911), which was cited with approval in *Garcia* v. *San Antonio Metro-*

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[20] The States of Nevada, South Carolina and Washington intervened as defendants to protect their interest in the creation of new disposal capacity. Pet. App. 9a.

politan Transit Authority, 469 U.S. 528, 556 (1985) —namely, preservation of " 'equality in dignity and power' among the several states," Pet. App. 15a (quoting 221 U.S. at 568). The court also pointed out that the transfer of title to nuclear waste is not an uncommon regulatory measure in this field. Pet. App. 15a-16a.

The court of appeals similarly rejected arguments based on the Eleventh Amendment and the Guaranty Clause. It reasoned that the Eleventh Amendment is not an independent limitation on Congress's power to legislate under the Commerce Clause, and that Allegany County's Guaranty Clause argument was "analytically indistinct" from the Tenth Amendment arguments raised by the other petitioners. *Id.* at 16a-17a.[21]

ARGUMENT

The decision of the court of appeals is consistent with this Court's decisions, and it does not conflict with the decision of any other court of appeals. The 1985 Act represents neither a breakdown in the protection of state interests in the national political process nor an extraordinary intrusion on state sovereignty. To the contrary, the federal policy that petitioners now attack was devised, in close cooperation with the States, as a means of resolving a serious dispute among the States in a manner that satisfied the States' own demands for authority over the subject matter, which they regarded as one of pressing local concern. Moreover, the only other two courts to have considered the question have sustained the 1985

[21] Petitioners also raised a due process objection in the district court, but they did not renew it on appeal. Pet. App. 10a.

Act against federalism challenges.[22] Further review therefore is not warranted.

1. a. The most recent decision of this Court to discuss the constitutional delineation of federal and state power is *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991). There, the Court pointed out that *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and related rulings permit only limited review of Acts of Congress on federalism grounds. Indeed, the Court's recognition that current law "has left primarily to the political process the protection of the states against intrusive exercises of Congress' Commerce Clause power" formed part of the rationale for *Gregory*'s requirement that Congress provide a "plain statement" of its intent if it wishes to constrain States' "fundamental" decisions, such as those concerning qualifications of their judges. 111 S. Ct. at 2400, 2403. The 1980 and 1985 Acts of course contain the requisite plain statements of congressional intent that the States assume responsibility for LLRW generated within their borders—and, at the same time, that the States have broad latitude in selecting the appropriate means for doing so.

b. This case presents no occasion for a defiinitive exposition of the types of flaws or malfunctions in the national political process that the Court's recent decisions have suggested might provide a basis for invalidating congressional enactments under the

[22] See *Concerned Citizens* v. *United States Nuclear Regulatory Commission*, No. CV90-L-70 (D. Neb. Oct. 19, 1990), slip op. 8-9, appeal docketed, No. 91-2784 (8th Cir. Aug. 12, 1991); *Michigan* v. *United States*, 773 F. Supp. 997 (W.D. Mich. 1991), appeal docketed, No. 91-2281 (6th Cir. Nov. 19, 1991).

Commerce Clause power. See *Garcia*, 469 U.S. at 556. To the extent, for example, that *South Carolina* v. *Baker*, 485 U.S. 505 (1988), calls for a statute-specific review of the legislative process, no reasonable procedural standard would threaten the 1985 Act. Petitioners do not suggest that New York or any other State was singled out in a way that left it "politically isolated and powerless," *Baker*, 485 U.S. at 513, or that any State was "deprived of any right to participate in the national political process." *Ibid.* To the contrary, the statutory policy that each State is "responsible for providing for the availability of capacity * * * for the disposal of [LLRW] generated within its borders," 1980 Act § 4(a)(1)(A), 94 Stat. 3348, originated with and was unanimously endorsed by the States themselves. See pages 4-5, *supra*. They sought this responsibility, coupled with significant powers to restrict interstate commerce in LLRW, in order to resolve the dispute between sited and non-sited States in a manner that enhanced state authority over the siting and operation of LLRW disposal facilities. The 1985 Act, also enacted with active state participation, was intended to salvage that approach.

New York, moreover, is in a particularly poor position to claim that it was excluded or victimized, given its support for the general approach of the 1980 and 1985 Acts during the legislative process, including enunciation of clear milestones and imposition of appropriate penalties when they are not met (see page 7, *supra*), and the fact, conceded by the State (91-543 Pet. 7), that "New York State's congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts." See pages 7-8, *supra*. For these reasons, it is difficult to

imagine a less suitable vehicle than this case for a further articulation of judicially enforceable principles governing federal-state relations.

c. Even when federalism challenges to congressional legislation were controlled by *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court eschewed the kind of wooden approach reflected in petitioners' selective account of the 1985 Act. For example, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Court expressly recognized that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission" even to federal enactments that regulate "'States as States,'" address indisputable "'attribute[s] of state sovereignty,'" and impair States' ability "'to structure integral operations in areas of traditional government functions.'" 452 U.S. at 287-288 & n.29 (citing *National League of Cities*, 426 U.S. at 845, 852, 854); see also *FERC* v. *Mississippi*, 456 U.S. 742, 764 n.28 (1982); *id.* at 778 n.4, 781 n.8 (O'Connor, J., dissenting). The dissenting opinion in *Garcia* expressed the same view, describing *National League of Cities* and its progeny as contemplating that an overriding federal interest might, in certain circumstances, outweigh the state interest in autonomy. 469 U.S. at 562-564 (Powell, J., dissenting); see also *id.* at 588 (O'Connor, J., dissenting).

In this case, petitioners do not dispute Congress's judgment that it was confronted with a "nationwide crisis" concerning the disposal of LLRW, S. Rep. No. 199, *supra*, at 4, and that the crisis had resulted specifically from a threatened exacerbation of barriers to interstate shipment of LLRW, the refusal by the States to accept responsibility for the LLRW

generated within their borders, and the continued willingness by most States to keep the burden of LLRW disposal on the three States that already had LLRW disposal facilities. See pages 3-6, *supra*. Petitioners likewise do not dispute that the States themselves—including New York—wished to assume responsibility for LLRW disposal and recommended that Congress enact legislation embodying that principle, while affording the States countervailing advantages and broad latitude in designing an LLRW disposal strategy. Finally, petitioners do not question that Congress properly may ascertain and act upon the existence of such a consensus among the States. In addition, the subject matter involved—furnishing a safe method for long-term disposal of radioactive wastes—is one that, by its nature, is impressed with a public interest that makes participation by state governments especially appropriate, since the States will have to respond to any long-term problems the waste may produce.

Accordingly, the federal interest underlying the 1980 and 1985 Acts embraced both the need to solve the interstate LLRW problem *and* the need to do so in a manner that respects state autonomy and the States' expressed interest in having regulatory authority. Thus, the "nature of the federal interest" advanced here (see *Virginia Surface Mining*, 452 U.S. at 288 n.29) fully justifies the policy of the 1980 and 1985 Acts that the States are responsible for disposal of LLRW waste. Compare *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting) (proper resolution of federalism claims "lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States").

The State of New York in fact *has* assumed responsibility for LLRW by enacting legislation that provides for the siting of an LLRW disposal facility within its borders, to be operated by the State itself. See pages 11-12, *supra*. It was particularly fitting for New York to take that step, because as the State acknowledges, "New York State has been active in the regulation of such materials within its borders for close to three decades as an agreement state in accordance with 42 U.S.C. 2021(b)" (91-543 Pet. 12 n.5); "the New York State Power Authority currently operates two nuclear power plants within the State, and waste materials are produced at various state hospitals and research facilities" (*ibid.*); and "New York State has sought for three decades to encourage the responsible development of nuclear power within its borders and has pioneered experiments in nuclear waste management technology" (91-543 Pet. 14). Petitioners do not contend that there are any new factors that now would make it technologically infeasible or uniquely burdensome for New York to follow through with the commitment that the State Legislature made in 1986 to assume responsibility for LLRW disposal.[23]

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[23] The brief filed by amici State of Ohio, *et al.*, similarly represents (at 3, 6) that the "States generally are progressing with the development of disposal facilities," although it is anticipated that "not all States will be able to develop or to obtain access to a disposal facility by 1996." Thus, any obstacles other States might meet appear to be ones of timing, not substance. There is no reason to believe at this time, four years before the effective date of the take-title provision, that any State that might not have a permanent solution in place by January 1, 1996, would not be able to arrange at least an interim solution with another State (or compact) that has a disposal facility.

d. Contrary to the petitioners' contention (91-543 Pet. 14; 91-558 Pet. 8, 14; 91-563 Pet. 15-16, 21-22, 26-28), affirmative federal directives to the States are not necessarily inimical to the constitutional balance between federal and state sovereignty. Congress's power to require state courts to hear actions brought under federal law, provided that similar state-law actions are within their jurisdiction, is well established. See *Testa* v. *Katt*, 330 U.S. 386, 392-394 (1947); accord *FERC* v. *Mississippi*, 456 U.S. 742, 760-763 (1982). To be sure, these types of commands to state courts may, as a general matter, threaten state sovereignty less than commands addressed to state executive officials and legislatures. See *FERC*, 456 U.S. at 762; *id.* at 784-785 (O'Connor, J., dissenting). But it is clear that, in some circumstances at least, affirmative federal directives may be addressed to other state officials as well.

For example, in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court endorsed the development of federal-law principles to govern interstate conflicts over pollution from municipal sewer systems. *Id.* at 107-108 (federal district courts can effectuate their resolutions of such disputes under federal common law by imposing obligations on public agencies created by the States); accord, *New Jersey* v. *City of New York*, 283 U.S. 473 (1931). Similarly, in *Colorado* v. *New Mexico*, 459 U.S. 176 (1982), the Court observed that it had in the past "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Id.* at 185 (citing *Wyoming* v. *Colorado*, 259 U.S. 419 (1922)). And in *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940),

the court warned that Colorado could be held in contempt if its officials failed to meet their obligation under the prior decree to prevent excessive diversions by Colorado citizens.[24]

Even in the context of an Act of Congress rather than a judicial decree, this Court has made clear that pursuit of valid federal objectives may properly result in the imposition of burdens on the States. See *Baker*, 485 U.S. at 515. The responsibilities that devolve upon the States under the federal Acts are less burdensome, for instance, than the obligations imposed by the Fair Labor Standards Act, which required States to change their employment practices and devote significant additional revenue to employee salaries, see *Baker*, 485 U.S. at 515 & n.8 (discussing effects of *Garcia*), and cannot be significantly more burdensome than the bond registration requirements at issue in *Baker*, which required "state legislatures * * * to amend a substantial number of statutes * * * and * * * state officials * * * to devote substantial effort to determine how best to implement a registered bond system." *Id.* at 514.

The responsibilities that devolve upon the States under the federal Acts also are far less substantial than

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[24] Petitioner Cortland County argues (91-563 Pet. 18-27) that Congress should have addressed the recurring LLRW crisis without imposing unavoidable responsibilities on the States. But it fails to identify less intrusive alternatives that would have accomplished the same objectives. The most obvious alternative—federal preemption—was contrary to the recommendations of the States themselves; Congress abandoned proposals for federal siting and operation of LLRW disposal facilities after the States indicated that "the siting of a low-level nuclear waste facility involves primarily state and local issues which are best resolved at the governmental level closest to those affected." C.A. App. 236; see *id.* at 251.

the obligations specified in the Clean Air Act regulations that EPA retracted in 1977, after they were found to be inconsistent with the Act in three appellate decisions cited by petitioners (91-543 Pet. 16 n.6; 91-558 Pet. 11-13, 18; 91-563 Pet. 11-13, 33-41). See *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), vacated and remanded, 431 U.S. 99 (1977); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977).[25] In those cases, the EPA Administrator construed the Clean Air Act as authorizing him, in the event a State failed to submit an adequate air pollution control plan, to promulgate a detailed federal plan and compel States to implement it by enacting legislation and appropriating funds. Noting that the Administrator's interpretation of his statutory powers would raise serious constitutional questions, three courts of appeals declined to construe the Act as allowing EPA to compel state implementation of federal plans. See *Maryland* v. *EPA*, 530 F.2d at 228; *District of Columbia* v. *Train*, 521 F.2d at 983-987; *Brown* v. *EPA*, 521 F.2d at 832-837.

These appellate rulings were subsequently vacated by this Court after the Administrator conceded that certain revisions had to be made in the challenged regulations. 431 U.S. 99 (1977). Accordingly, con-

[25] See also *Arizona* v. *EPA*, 521 F.2d 825 (9th Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); *Alaska* v. *EPA*, 521 F.2d 842 (9th Cir. 1975). But see *Pennsylvania* v. *EPA*, 500 F.2d 246, 260-263 (3d Cir. 1974) (upholding EPA regulations against statutory and constitutional challenges).

trary to petitioners' contention, they do not furnish any basis for a claim of a circuit conflict with the decision below. Moreover, in contrast to the EPA regulations, which would have required States to mobilize their own employees to implement detailed federal measures, the federal Acts afford States broad flexibility regarding the structure and administration of their own LLRW programs. It requires little more than that States ensure adequate intrastate or intra-compact capacity for LLRW generated within their borders, as the States had informed Congress they were prepared to do. States exercise wide discretion over technical and administrative means for achieving that end. See pages 10-11, *supra*. In a similar vein, the obligations imposed on the States by the EPA regulations, unlike those under the Acts at issue here, were not accompanied by provisions that significantly increased state control over interstate commerce in the interest of local autonomy. And, having been imposed by regulations rather than by explicit provisions of a federal statute, they could not have met the clear statement requirement of *Gregory* v. *Ashcroft*—which is satisfied here. Thus, the three EPA cases—which, in any event, predated *Garcia*, *Baker*, and *Gregory*—would not conflict with the decision below even if they had not been vacated by this Court.

e. In sum, petitioners greatly exaggerate the significance of the statutory declaration that States are responsible for disposal of LLRW generated within their borders. That provision cannot properly be viewed in isolation. We may assume that constitutional principles of federalism would prohibit the imposition of affirmative obligations on the States in many circumstances. See *FERC*, 456 U.S. at 765-766.

But the overall structure of the 1985 Act is permissible—and, indeed, it resolved the interstate conflict between sited and non-sited States in a manner that comported with the States' own preference for a "state solution" to LLRW disposal. The flexibility that was reserved to the States by this solution affirmatively advanced the very values of governmental responsiveness, democratic participation, and local innovation that underlie the constitutional structure of dual sovereignty (see *Gregory* v. *Ashcroft*, 111 S. Ct. at 2399)—and that petitioners invoke in this case.

2. At bottom, the congressional declaration in the 1980 Act that each State is responsible for disposal of LLRW generated within the State is a statutory recognition of the broad police powers of the States—and of the corresponding obligations that necessarily ensue as a practical matter—concerning protection of the public health and safety within their borders. It is difficult to see how such a declaration, standing alone, offends state autonomy. Moreover, the provisions of the 1980 and 1985 Acts by which Congress has initially sought to effectuate that policy—*e.g.*, those permitting conforming States to charge higher prices for, or to exclude, out-of-compact LLRW after the passage of statutory milestones—are routine examples of Congress's ability to offer inducements for the States to act. Cf. *South Dakota* v. *Dole*, 487 U.S. 203 (1987). They therefore raise no question under the Tenth Amendment or related principles of federalism.

Petitioners New York and Cortland County principally object, however, to the "take-title" provision of the 1985 Act, 42 U.S.C. 2021e(d)(2)(C). See 91-543 Pet. 6; 91-563 Pet. 8, 17. That provision requires each State or compact that fails to ensure disposal capacity for the LLRW generated within its borders to take title to such waste at the request of generators who are ready to ship it, and either to take possession of such waste or to compensate generators who involuntarily retain possession for any damages they incur. To be sure, this provision, if actually triggered in a particular instance in the future, might raise further federalism concerns. But petitioners fail to explain why it currently raises distinct concerns of such constitutional magnitude as to warrant this Court's attention here. The take-title provision—the only provision of the 1985 Act that can fairly be characterized as more "stick" than "carrot" for a State—does not become operative *until 1996*. Although the United States has not argued that petitioners' challenge is therefore unripe, the speculative nature of the harms ascribed to the take-title provision weighs heavily against further review at this time to consider the constitutionality of that specific provision.

That is especially so since its does not appear that the take-title provision was the inducement for the New York Legislature to enact the 1986 law that provides for establishment of an LLRW facility in the State, and there is no indication that the Legislature would repeal the 1986 law if the take-title provision were stricken from the federal Act. In fact, the introductory section of the law enacted by the New York Legislature in 1986 makes no mention of the take-title provision; it instead recites that the 1986 law was enacted because of the provisions of the federal Acts that would permit other States to exclude LLRW generated in New York, which could, in turn, impair the continued operation of essential and beneficial medical, research, industrial, energy, and other

facilities in the State. See pages 11-12 and note 16, *supra*. Nor have petitioners shown that New York State will be unable to meet the January 1996 deadline, after which a generator in New York might trigger the take-title provision,[26] or that, if triggered, the provision would have an effect for more than a brief period of transition until the State had completed its provisions for LLRW disposal.

In any event, the take-title provision of the 1985 Act merely adjusts rights and responsibilities between LLRW generators and the States in which they operate, in the context of a pervasively regulated field that is impressed with a strong public interest of both statewide and nationwide scope and importance. Moreover, it is unclear whether the provision operates independently to create a federal cause of action for damages (assuming, of course, that an occasion for liability would ever arise), rather than stating a general principle of liability or identifying the owner for purposes of state liability schemes, if any. At this stage, considerably before the take-title provision has gone into effect, there has been no opportunity for courts to provide definitive guidance on this point.[27]

[26] To the contrary, New York informed the court of appeals that it was "currently in full compliance with the 1985 Act" and that it had certified in 1989 that it would "be able to store, manage or dispose of its LLRW after January 1, 1993." N.Y. C.A. Reply Br. 10 & n.8.

[27] In a similar vein, petitioner Cortland County suggests that generators could use the take-title provision to compel States to take physical possession. See 91-563 Pet. 16-17. The language of the provision, however, is plainly susceptible of a narrower interpretation, under which non-complying States and compacts may refuse possession but become liable for damages if they do so. See 91-558 Pet. 4-5 (Allegany County's adoption of this narrower reading). Cortland County's expansive reading of the take-title provision has never been endorsed by the NRC. Moreover, to the extent such an interpretation would raise serious federalism concerns, the plain statement rule of *Gregory* v. *Ashcroft* may be implicated. See 111 S. Ct. at 2400, 2403.

In addition, even if the take-title provision were to be construed to contemplate a federal cause of action for damages, creation of such liability as a corollary to federal regulation is quite different from the direct imposition of federal commands and sanctions at issue, for example, in the EPA cases discussed above.

For the foregoing reasons, the speculative possibility that the 1985 Act's take-title provision might be triggered by a generator in New York after January 1, 1996, does not present an occasion for review here.

3. Petitioner Allegany County renews its argument (91-558 Pet. 15-18) that the 1985 Act violates the Constitution's provision that Congress shall guarantee to each State a republican form of government. U.S. Const. Art. IV, § 4. To the extent Allegany County merely relies on the Guaranty Clause as part of the source material for the constitutional principles of federalism, its argument requires no independent response, as the court of appeals correctly observed. Pet. App. 17a. But to the extent the County invokes the Clause as a distinct limitation on Congress's Commerce Clause power that is not reflected in the Tenth Amendment case law, the argument is foreclosed. It is well established that Guaranty Clause claims are not justiciable, whether raised against the States, *Baker* v. *Carr*, 369 U.S. 186, 223-224 (1962), or against the federal government, *id.* at 224-226; *City of Rome* v. *United States*, 446 U.S. 156, 182 n.17 (1980).[28]

[28] Even if Guaranty Clause claims were otherwise justiciable, it is doubtful whether the particular claim at issue here

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1991

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could be presented against the United States by a political subdivision of the State where, as in this case, the State itself has declined to press the claim on behalf of its citizens. Cf. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923).

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NOS. 91-543; 91-558; 91-563

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGHENY and THE COUNTY OF CORTLAND, NEW YORK

Petitioners,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy;
KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission;
THE UNITED STATES NUCLEAR REGULATORY COMMISSION;
SAMUEL K. SKINNER, as Secretary of Transportation; and
WILLIAM P. BARR, as United States Attorney General,

Respondents.

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' STATES OF WASHINGTON, NEVADA AND SOUTH CAROLINA BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did congressional enactment of the Low-Level Radioactive Waste Policy Act of 1980, and its 1985 Amendments, which ratify and implement the unanimous agreement of all the states of the Union to fairly allocate the responsibility for the nation's low-level radioactive waste disposal capacity among themselves, violate the Tenth Amendment or the Guarantee Clause, Article IV, § 4, of the United States Constitution?

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NOS. 91-543; 91-558; 91-563

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGHENY and THE COUNTY OF CORTLAND, NEW YORK
Petitioners,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy;
KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission;
THE UNITED STATES NUCLEAR REGULATORY COMMISSION;
SAMUEL K. SKINNER, as Secretary of Transportation; and
WILLIAM P. BARR, as United States Attorney General,
Respondents.

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,
Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' STATES OF WASHINGTON, NEVADA AND SOUTH CAROLINA BRIEF IN OPPOSITION

WHAT THIS CASE IS REALLY ABOUT

The states of Washington, Nevada, and South Carolina (sited states) have been the hosts of the only operating low-level radioactive waste disposal sites since 1978. The disposal sites are located at Hanford in the state of Washington, Beatty in the state of Nevada, and Barnwell in the state of South Carolina.

In 1979, the state of Nevada twice temporarily closed the Beatty site due to the improper handling within the state of several low-level radioactive waste shipments being sent to the site.[1] In October 1979, similar transportation and packaging problems caused the governor of Washington to temporarily close the Hanford site.[2] The closures of the Nevada and Washington disposal sites caused the share of low-level waste being accepted in South Carolina to rise to 80 percent of the entire nation's low-level waste. Because of this result, the governor of South Carolina ordered the Barnwell site to only accept one-half the annual amount of waste that it was then receiving. The inadequacy of existing disposal capacity for low-level radioactive waste was at this time a major concern of both the sited and unsited states. A national disposal system with only three sites for waste from all 50 states was vulnerable to widespread health and safety crises.[3]

The sited states were particularly unhappy with the equities of the existing situation. The sited states believed it was unfair that they be required to provide disposal facilities for all 47 of the "unsited" states. In addition to the limitation imposed by the South Carolina governor in 1979, the voters in the state of Washington approved an initiative in 1980 that banned the disposal of out-of-state low-level radioactive waste at Hanford.[4]

In the wake of this crisis, Congress began to consider federal solutions to the problem. However, the states asked that Congressional action be deferred in order to allow the

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[1]H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 17, *reprinted in* 1985 U.S. Code Cong. & Ad. News at 3006.

[2]*Id.*

[3]*Id.*

[4]The initiative was declared unconstitutional *See Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

states to develop a low-level radioactive waste policy. Congress agreed. Given this opportunity by Congress, the states acted quickly. The National Governors Association (NGA) created a task force to review and formulate state policy regarding low-level radioactive waste.[5] Another state-created organization called the State Planning Council on Radioactive Waste Management, recommended to President Carter that the national policy on low-level radioactive waste should be that every state is responsible for the disposal of low-level radioactive waste generated within its boundaries, and that states may enter into interstate compacts to carry out the responsibility. The National Conference of State Legislatures and the National Governors Association also adopted this recommendation. The NGA Task Force concluded that the siting of low-level radioactive waste facilities involved primarily state and local issues and should be resolved at those governmental levels.[6]

Thus the states recommended solving the problem of low-level radioactive waste disposal capacity on a regional basis, whereby several states would enter into an interstate compact to establish a new disposal facility for waste generated within the Compact region. In accordance with the states' recommendations, Congress enacted the Low-Level Radioactive Waste Policy Act of 1980, which was codified at 42 U.S.C. §§ 2021b-2021d (1980 Act).[7]

The 1980 Act gave the regional Compacts the authority to restrict, after January 1, 1986, use of the regional disposal facility to waste generated within the region. In effect the unsited states were given a deadline of January 1, 1986 to establish their own regional disposal facilities.[8]

As the deadline approached, the states began to realize that finding sites within the unsited regions probably could

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[5]1985 U.S. Code Cong. & Ad. News at 3007.

[6]*Id.*

[7]*Id.*

[8]*Id.*

not be accomplished by January 1, 1986, although significant progress was achieved in developing regional disposal Compacts. Thirty-nine states had entered into compacts by the summer of 1985, but progress on achieving Congressional ratification of the compacts was slowed by the fact that only the Northwest,[9] Southeast,[10] and Rocky Mountain Compact[11] states would have had disposal capacity available as of January 1, 1986; the other non-sited states would not have had any place to send their waste for disposal after that date. The process envisioned in the 1980 Act was grinding to a halt, creating a crisis similar to that which had existed in 1979.[12]

The sited states threatened that they would close their facilities to all waste if Congress did not pass acceptable legislation by January 1, 1986. The states again under the auspices of the National Governors Association developed a compromise under which the states of Washington, South Carolina, and Nevada agreed to continue to accept all of the nation's low-level radioactive waste for an additional seven years in exchange for incentives and penalties that would better guarantee that new sites would be developed.[13] The state-generated and state-approved National Governors Association proposal served as the foundation for Congressional action.

The legislation required that the unsited states meet specified milestones during the interim access period from 1986-1992, in order for the waste generators within their borders to receive continued access to disposal facilities. The sited states would be permitted, on an annual basis, to

[9]The Northwest Interstate Compact includes Washington, Oregon, Idaho, Montana, Utah, Alaska, and Hawaii.

[10]The Southeast Compact includes South Carolina, North Carolina, Virginia, Tennesee, Mississippi, Alabama, Georgia, and Florida.

[11]The Rocky Mountain compact includes Nevada, Wyoming, Colorado, and New Mexico.

[12]*Id.*

[13]*Id.* at 3008.

cap the amount of waste disposed of at their facilities and they would also be permitted to impose fixed surcharges on any waste accepted for disposal from outside the region.[14]

The sited and unsited states strongly urged Congress to adopt these basic elements of the compromise. Widespread state support allowed these elements to remain in the bills which passed each house and in the final legislation. On December 19, 1985, the low-level radioactive waste disposal crisis was averted when the compromise legislation passed unanimously as the Low-Level Radioactive Waste Policy Amendments Act of of 1985 (1985 Amendments Act) and seven compacts were ratified under the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act.[15]

Under the 1985 Amendments Act, significant progress has been made by several states and Compacts in developing new low-level radioactive waste disposal capacity. The states of California, Arizona, North Dakota, and South Dakota have formed the Southwest Compact, with California as the host state. Illinois is the host state of the Central-Midwest Compact, made up of Illinois and Kentucky. Nebraska is the host state of the Central Compact, which includes Nebraska, Kansas, Oklahoma, Arkansas, and Louisiana. The Appalachian Compact with Maryland, Delaware, West Virginia, and Pennsylvania is siting a disposal facility in Pennsylvania. Ohio is the host state of the Midwest Compact, which includes Ohio, Indiana, Missouri, Iowa, Minnesota, and Wisconsin. Texas is a "go-it-alone" state, developing its own disposal site without a regional compact. Each of these Compacts and states have made significant progress toward development of operational low-level radioactive waste disposal facilities in compliance with the 1985 Amendments Act. California, Nebraska, and Illinois have submitted license applications for their disposal facilities to the Nuclear Regulatory Commission.

[14]*Id.* at 3008-3009.

[15]131 Cong. Rec. H38115-38120; S38403-38425.

California expects its new disposal facility to be operating before the end of 1991.

In addition, pursuant to the contracting provision of the 1985 Amendments Act, the Northwest Compact and the Rocky Mountain Compact have negotiated a proposed agreement whereby the states of Nevada, Wyoming, New Mexico, and Colorado will have access to the disposal site located in Washington after December 31, 1992. This agreement furthers the 1985 Amendments Act policy to regionalize disposal capacity.

The probability that the 1985 Amendments Act process will result in the orderly development of new low-level radioactive waste disposal capacity throughout the nation has been central to the sited states' decision to provide continued access to the disposal sites for the disposal of low-level radioactive waste generated outside the sited states, pursuant to the 1985 Amendments Act.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS MISCHARACTERIZE THE ISSUE IN THIS CASE

In their petitions, the state of New York and the two counties characterize the issue as if Congress directed the states to be responsible for the disposal of low-level radioactive waste. The Petitioners try to create the impression that such responsibility was foisted upon unwilling states by the federal government, or that the states were commandeered by Congress to assume this responsibility. This characterization is inaccurate. *See supra*, pp.1-5. Both the 1980 Act and its 1985 Amendments are more properly characterized as a voluntary agreement among the states to be responsible for the disposal of low-level radioactive waste on a regional and equitable basis.[16] The Court of Appeals' opinion neatly and properly characterizes these laws as:

> paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics.

State of New York v. United States, 942 F.2d 114, 119 (2nd Cir. 1991).

The states are entitled to enter into agreements among themselves which can then be ratified by Congress in order to be enforced in the state and federal system. The states unanimously agreed to assume the responsibilities and liabilities the state of New York now claims were foisted upon it by Congress.

II. THE CIRCUIT COURTS OF APPEAL HAVE CONSISTENTLY AND PROPERLY APPLIED GARCIA AND BAKER

In their petitions, the state of New York and the two counties ask this Court to review the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The petitioners' theory is that the 1985 Amendments Act interferes with New York's sovereign powers and thus violates principles of federalism under the Tenth Amendment of the United States Constitution.[17]

The Second Circuit properly deferred, under the Tenth Amendment, to the agreement of all the states, including New York, which supported the national political process in creating the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Petitioners fail to show that the Sec-

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[16]The legislative history of the 1985 Amendments Act and 1980 Act distinguishes this case from *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1979), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 U.S. 99 (1977).

[17]Although the Petitioners claim that the Guarantee Clause, Art. IV, § 4, of the United States Constitution is also violated, this Court has consistently held that challenges to legislation based on the Guarantee Clause are not justiciable. *City of Rome v. United States*, 446 U.S. 156, 182 n. 17 (1980); *Baker v. Carr*, 369 U.S. 186, 228-29 (1962).

ond Circuit is out of step with the Tenth Amendment analysis of its sister circuits or this Court.

The Tenth Amendment limits on Congress' authority to regulate the states were set out by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). "*Garcia* holds that the [Tenth Amendment limits on Congress' authority to regulate state activities] are structural, not substantive, *i.e.*, that states must find their protection from Congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, 485 U.S. 505 (1988).

This Court in *South Carolina v. Baker* went on to state that

> although *Garcia* left open the possibility that some extraordinary defects in the national political process might render Congressional regulation of activities invalid under the Tenth Amendment,* * * nothing in *Garcia* or the Tenth Amendment authorizes courts to second guess the substantive basis for legislation. Where * * * the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.

Id. at 512-513. The court observed that

> South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.

Id.

The United States Court of Appeals for the Ninth Circuit recently construed the Tenth Amendment consistent with both *Garcia* and *Baker* in a case dealing with the siting of a disposal site for high-level nuclear waste in *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1105 (1991). In that case, Nevada argued that

> because Nevada was not represented on the House and Senate Conference Committee on the Omnibus Budget Reconciliation Act of 1987 when the 1987 [Nuclear Waste Policy Act] amendments were approved, it was deprived of its 'right to participate in the national political process' and 'was singled out in a way that left it politically isolated and powerless.'

Id. at 1556 (quoting Petitioners' Opening Brief at 40, quoting *South Carolina v. Baker*, 485 U.S. at 512).

The Ninth Circuit Court of Appeals rejected Nevada's arguments and focused on the national political process in the factual setting presented:

> Nevada cannot point to any defect in the political process that led to the enactment of the 1987 NWPA Amendments. As the Secretary points out, the Tenth Amendment does not protect a state from being outvoted in Congress. * * * Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process. To the extent that Nevada asserts that lack of representation created a defect in the political process as contemplated by *South Carolina v. Baker*, it cannot succeed in light of the plenary consideration given to the Omnibus Budget Reconciliation Act of 1987.

Id. at 1556-1557.

Based on the foregoing, it is clear that *Garcia* properly limits courts to an examination of the national political process "in the factual setting" presented, in order to determine whether Congress has transgressed the Tenth Amendment in the exercise of its Commerce Clause powers. *See Garcia*, 469 U.S. at 556. That is, *Garcia* permits a procedural examination of the national political process and not a substantive review of Congressional actions under a *Garcia* exception.

In this case, rather than being denied the opportunity to participate in the national political process, the state of New York actively sought the legislative consensus that became the 1985 Amendments Act. The specific views of the state of New York were aired during Congressional hearings on the Act. In particular on March 7, 1985, Mr. Charles R. Quinn, Deputy Commissioner for Policy and Planning of the New York State Energy Office, testified

> New York State supports the efforts * * * to resolve the current impasse over Congressional consent to the proposed low-level radioactive waste compacts * * * New York State has been participating with the National Governors Association * * * in an effort to * * * reach a consensus between all groups.[18]

According to Mr. Quinn's testimony, one of the "major points which [New York] believes must be incorporated within any Congressional Act on this matter" was "appropriate penalties * * * for failure to meet designated milestones."[19]

The take-title penalty provision was devised by the Senate Environment and Public Works Committee and accepted by the NGA Task Force and the states[20]. New York State was not isolated when Congress added that provision to the 1985 Amendments Act. Senator Moynihan of New York was a member of that committee. Just before passage of the 1985 Amendments Act, Senator Moynihan strongly supported the bill

> Mr. President, the low-level nuclear waste bill before us is a well-balanced compromise, and a most necessary one. Without clear action by the Congress, the governors of the three states that have been disposing of all of our commercial low-level nuclear waste have threatened to shut down the disposal sites in their states. I cannot say that I blame them. * * *
>
> I am pleased to report that this complex bill meets those conflicting needs very well.* * *
>
> The timetables required by this measure are firm and realistic. It is indeed an equitable approach for all concerned, and I am pleased to support it.[21]

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[18]Amendments to the Federal Low-Level Radioactive Waste Policy Act of 1985: Hearings on HR 1083 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong., 1st Sess. 197 (1985).

[19]*Id.* at 197-198

[20]Although the Appellants challenge the Amendments Act as a whole, they focus especially on the "take title provision," 42 U.S.C. § 2021e(d)(2)(C) which requires states to take title to the waste if they have not made arrangements for a disposal site by January 1, 1996. *See 131 Cong. Rec. S38405.*

[21]131 Cong. Rec. S38423.

No member of the New York State Congressional Delegation opposed the take-title provision, and the bills containing the penalty were unanimously passed by both the Senate and the House by voice vote.

The Petitioners' constitutional challenge to the 1985 Amendments Act is an attempt to continue to reap the benefits of the compromise agreement by the sited states to continue to accept out-of-region wastes until 1993, without New York accepting the burdens of developing waste disposal capacity to which it had agreed in 1985. The state of New York licenses the use of radioactive materials for various beneficial uses as an agreement state under the Atomic Energy Act. New York obtains the benefits of the use of these nuclear materials, and pursuant to the 1985 Amendments Act continues to shift the burden of disposal onto the sited states. New York would disrupt the compromise agreed to by the states in 1985 to share that burden and which was incorporated into the 1985 Amendments Act. If the 1985 consensus is to be revisited, the proper forum for such a process is among the states' elected representatives in Congress and not the federal courts.

> Negotiation and agreement with congressional, rather than judicial, supervision has long been the preferred method, provided by the Constitution, for resolution of interstate and sovereign disputes. When reviewing the complex provisions of the [1985 Amendments Act], courts should take particular note of this traditional preference.[22]

The 1985 Amendments Act is a fair and reasonable compromise developed among the states and enacted through the national political process. The Petitioners fail to show that they were denied an opportunity to participate in the national political process that brought about the leg-

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[22]Berkovitz, *Waste Wars: Did Congress Nuke State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harvard Env. L. Rev. 437, 475-476 (1987).

islation at issue. The Petitioners also fail to show that the Courts of Appeal have inconsistently applied the *Garcia* and *Baker* tests.[23]

The 1980 Act and its 1985 Amendments Act is an example of federalism operating at its highest and best level. The Tenth Amendment does not prohibit states from agreeing among themselves to solve a national waste disposal problem. The 50 sovereign United States participated in the national political process to forge a consensus to solve a serious problem that affects all the states—the safe disposal of low-level radioactive waste.

CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be denied.

DATED this 5th day of December 1991.

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[23]Even if this Court were inclined to revisit *Garcia* and *Baker*, in light of the legislative history of the 1980 Act and its 1985 Amendments this case does not present a promising vehicle to do so.

(2)

Supreme Court, U.S.
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No. 91-543
SUPREME COURT
OF THE UNITED STATES
October Term, 1991

THE STATE OF NEW YORK,

Petitioner,

v

THE UNITED STATES OF AMERICA, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF MICHIGAN IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I

WHETHER STATE SOVEREIGNTY PROHIBITS CONGRESS FROM ENACTING A STATUTE UNDER THE COMMERCE CLAUSE WHICH IS DIRECTED EXCLUSIVELY AT THE STATES AND WHICH MANDATES THAT THE STATES ASSUME RESPONSIBILITIES AND TAKE ACTIONS WHICH REQUIRE THE STATES TO EXERCISE THEIR EXECUTIVE OR LEGISLATIVE POWERS.

II

WHETHER A CONGRESSIONAL STATUTE WHICH REQUIRES A STATE TO EXERCISE ITS EXECUTIVE OR LEGISLATIVE POWERS VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT PREVENTS A STATE IN THE EXERCISE OF THOSE POWERS FROM BEING RESPONSIVE TO THE MAJORITARIAN WILL OF ITS CITIZENS.

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II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW ON WHETHER A CONGRESSIONAL STATUTE WHICH REQUIRES A STATE TO EXERCISE ITS EXECUTIVE AND LEGISLATIVE POWERS VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT PREVENTS A STATE IN THE EXERCISE OF THOSE POWERS FROM BEING RESPONSIVE TO THE MAJORITARIAN WILL OF ITS CITIZENS 19

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INTEREST OF THE STATE OF MICHIGAN

The decision in this case of the United States Court of Appeals for the Second Circuit presents important questions of federal constitutional law pertaining to federalism which have not been, but which should be, settled by this Court.

Petitioners are challenging the constitutionality of the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 USC §§ 2021b-2021j (1985 Act) on state sovereignty grounds which have their basis in the Tenth Amendment of the United States Constitution and the Guarantee Clause found in art IV, § 4 of the United States Constitution. The State of Michigan files this amicus brief as a state whose sovereignty is violated by the 1985 Act.

The 1985 Act imposes an absolute duty on the states to provide for the disposal of low level radioactive waste (LLRW) covered by the statute. No provision is set forth in the 1985 Act which allows a state to decline to accept the responsibility of providing for the disposal of LLRW. Further, the vast majority of this LLRW is generated and owned by private proprietary entities.

The 1985 Act is a statute aimed exclusively at the states, mandating that they carry out and implement a federal policy for LLRW disposal. This mandate inevitably requires states to exercise their legislative and executive powers in order to comply with their disposal responsibility for all LLRW generated within the respective states.

42 USC § 2021c(a)(1) of the 1985 Act provides, in pertinent part:

> Each state shall be responsible for providing, either by itself or in cooperation with other states, for the disposal of -
>
> (A) Low level radioactive waste generated within the state ....

In addition to this heavy burden with its accompanying requirements, there are specific requirements within the 1985 Act requiring the exercise of state executive or legislative powers, or both. As an example, 42 USC § 2021e(e)(1)(C) requires a state to file a complex LLRW disposal application with the Nuclear Regulatory Commission (NRC) or, in the alternative, requires the State's Governor to provide a written certification to the NRC that actions have been taken to ensure disposal capacity for all the applicable

LLRW generated within the state after December 31, 1992.

The manner in which states exercise their legislative and executive powers may differ because of the unique circumstances and laws within each state and the manner in which a state chooses to comply with the 1985 Act. There are various options: LLRW compact membership, acting alone and building an LLRW disposal facility, or contracting with another state or compact for LLRW disposal. However, all of these options inevitably require the exercise of a state's legislative or executive powers or both, to carry out the LLRW disposal responsibility.

With respect to the State of Michigan, some of the executive and legislative actions taken were as follows.

1. Entering into the Midwest Interstate Low Level Radioactive Waste Compact through the passage of legislation, 1982 PA 460.

2. The passage of legislation, 1987 PA 204, creating a Low Level Radioactive Waste Authority to carry out the state's responsibilities to provide for the disposal of LLRW.

3. The passage of legislation, 1987 PA 203, to provide for Michigan Department of Public Health oversight over the siting of a low level radioactive waste disposal facility.

4. The appointment of a Low Level Radioactive Waste Authority Director and a Commissioner to the Midwest Interstate Low Level Radioactive Waste Compact.

5. The amendment of a state statute, 1987 PA 113 in order to allow for the previously prohibited disposal of LLRW in Michigan.

The State of Michigan is challenging the constitutionality of the 1985 Act on State Sovereignty and Guarantee Clause grounds in State of Michigan, et al v

United States of America, et al, U.S. District Court, WD of Michigan, Case No. 5:90-CV-27. The State of Michigan is currently appealing the dismissal of this case to the U.S. Court of Appeals for the Sixth Circuit. The Midwest Interstate Low Level Radioactive Waste Commission voted to revoke the State of Michigan's membership in the compact on July 24, 1991.

SUMMARY OF ARGUMENT

In this case, Petitioner is challenging the constitutionality of the 1985 Act on state sovereignty grounds which have their basis in the Tenth Amendment to the United States Constitution and the Guarantee Clause found in art IV, § 4 of the United States Constitution.

In filing this amicus brief, the State of Michigan concedes that Congress can persuade or pressure the states to do or refrain from doing something even when such pressure is onerous. It is well-established that Congress can use the carrot and the stick approach in getting states to do what it wishes. But, in the previous cases heard by this Court, the state had the option of not doing what Congress wanted if they were willing to forego the benefit or suffer the consequences (such as a loss of federal funding or abandoning a regulatory field where they had a vital interest).

The essential difference about the 1985 Act, which is being challenged in this lawsuit, is that it mandates the states' responsibility for the disposal

of LLRW generated by private and federal generators within its borders. Unlike other congressional enactments, a state cannot escape the responsibility for LLRW disposal by suffering certain consequences, however onerous they may be. This mandatory imposition of responsibility for LLRW disposal, forces Michigan to employ its legislative and executive powers to carry out federal policy.

This brief argues that the 1985 Act, as a statute directed exclusively at the states which mandates the states assume responsibilities and take actions which require the states to exercise their executive and legislative powers, presents an important question of federal constitutional law on the extent to which state sovereignty limits the ability of

Congress, under the Commerce Clause, to enact such a statute.

Further, this brief argues that by forcing states to employ their legislative and executive powers to carry out the LLRW disposal responsibility imposed upon the states, the 1985 Act prevents the states from being responsive to the majoritarian will of its citizens. It is argued that this raises an important federal constitutional question as to whether the 1985 Act, in not allowing state governments to be responsive to the majoritarian will of its citizens on the issue of LLRW disposal, effects a denial of a republican form of government on that issue in contravention of the Guarantee Clause of the United States Constitution.

Finally, this brief argues that the reading of Garcia v San Antonio Metropolitan Transit Authority, 469 US 528 (1985), urged by Defendants and adopted by the lower courts in this case, results in undue deference to the judgment of Congress in passing the legislation that fails to give appropriate consideration to the Tenth Amendment and Guarantee Clause concerns of the states and in effect forecloses the judiciary from conducting an independent determination of the constitutionality of the 1985 Act. It is argued that such a reading is not consistent with the principle of judicial review established in the landmark case of Marbury v Madison, 1 Cranch 137 (1803), and that, therefore, this case raises the important federal question as to the extent to which the Garcia case

prevents courts from exercising judicial review over the constitutionality of a statute challenged on federalism grounds in light of the principle of judicial review established in the landmark case of Marbury v Madison.

ARGUMENT

I

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW ON WHETHER STATE SOVEREIGNTY PROHIBITS CONGRESS FROM ENACTING A STATUTE UNDER THE COMMERCE CLAUSE WHICH IS DIRECTED EXCLUSIVELY AT THE STATES AND WHICH MANDATES THAT THE STATES ASSUME RESPONSIBILITIES AND TAKE ACTIONS WHICH REQUIRE THE STATES TO EXERCISE THEIR EXECUTIVE AND LEGISLATIVE POWERS.

The issue presented in this case is unique. It presents the first case involving a congressional statute, aimed exclusively at the states, which mandates that a state exercise its executive and

legislative powers. Most of the previous cases reaching this Court, which presented the issue of whether Congress, under the Commerce Clause, could "require" states to take certain actions, have been of the carrot and the stick variety. If states were willing to forego federal benefits, i.e., a loss of federal funds, or if states were willing to suffer "federal sanctions", i.e., abandoning a regulatory area in which they have a vital interest, the state could escape having to carry out the will of Congress.

A classic example of Congress using the carrot and stick approach was presented in a case in which this Court denied certiorari. In Nevada v Skinner, 884 F2d 445 (9th Cir, 1989) cert denied,

110 S Ct 1112 (1990), Congress, through legislation, threatened the withholding of 95% of Nevada's federal highway funds if Nevada did not enact a 55 mile per hour speed limit. In other cases presented to this Court, states have been faced with complying with congressional standards or abandoning a regulatory field in which a state has an overriding interest. See FERC v Mississippi, 456 US 742 (1982).

In the legislation at issue in these previous cases, though the price may be high, the state's freedom to employ or not to employ their legislative and executive powers to carry out the will of Congress was left intact. That is not true under the 1985 Act. In this act, Congress has mandated that states must

provide for the disposal of all LLRW generated within the state except for certain exempt federally generated LLRW.

This unprecedented intrusion on state sovereignty is exacerbated by the taking title and liability provision found in § 2021e(d)(2)(c) of the 1985 Act. By requiring that if states are unable to provide for the disposal of LLRW by January 1, 1996, they must accept from private and federal generators of LLRW, title of the LLRW and liability for all damages directly or indirectly related to the LLRW, this provision appropriates by federal edict a state's credit and puts its treasury at risk to cover a liability which would under the law normally be that of the private proprietary and federal generators of the hazardous LLRW.

In the other federalism cases considered by this Court, the states were merely being required to comply with the law of the land, like everyone else. Both National League of Cities v Usery, 426 US 833 (1976), and Garcia v San Antonio Metropolitan Transit Authority, 469 US 528 (1985), involved the application of the overtime and minimum wage requirements of the Fair Labor Standards Act (FLSA) to the states. The FLSA is a statute that applies to employers in the private sector as well as employers in the state government sector. The FLSA was not directed exclusively at the states. Thus, the broad issue in Usery and Garcia was whether what is the law of the land for everyone else would apply to the states.

> SAMTA [the state agency] faces nothing more than the same minimum wage

> and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet. Garcia, 469 US at 555.

But in the instant case, the responsibility to provide for LLRW disposal in the 1985 Act is directed exclusively at the states. This Court has never held that a congressional statute directed exclusively at the states may commandeer the states' legislative and executive powers.

In South Carolina v Baker, 485 US 505 (1989), there was a challenge to § 310 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) which removed a federal income tax exemption for bonds issued by states and local governments unless those bonds are issued in registered form. This meant that for states to continue to offer lower interest rates

and remain competitive in the bond market, they would have to issue registered bonds. The removal of the income tax exemption was part of a statutory program to eliminate tax evasion. Section "310 ... covers not only state bonds but also bonds issued by the United States and private corporations." Baker, 485 US at 510. Thus, unlike the 1985 Act, TEFRA was not directed exclusively at the states. In finding § 310 constitutional, this Court stated:

> Because, by hypothesis, section 310 effectively prohibits issuing unregistered bonds, it presents the very situation FERC [v Mississippi, 456 US 742 (1982)] distinguished from a commandeering of state regulatory machinery: the extent to which the Tenth Amendment 'shields' the states from generally applicable federal regulations. (citations omitted). Baker, 485 US at 514 (Emphasis added)

Thus, in Baker, the Supreme Court found that there was not a commandeering of

state powers. It is true that in Baker there is some language which suggests that some commandeering of state powers is permissible. However, the permissible commandeering of state powers is limited to situations in which a state has chosen to engage in a federally regulated activity.

> Such 'commandeering' is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity, is a commonplace that presents no constitutional defect. Baker, 485 US at 514-515 (Emphasis added)

Under the 1985 Act, however, states are not given a choice of engaging or not engaging in a federally regulated activity. The 1985 Act and its mandate that

states must provide for LLRW disposal, is not limited to states which have voluntarily chosen to get involved in LLRW disposal.

II

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW ON WHETHER A CONGRESSIONAL STATUTE WHICH REQUIRES A STATE TO EXERCISE ITS EXECUTIVE AND LEGISLATIVE POWERS VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT PREVENTS A STATE IN THE EXERCISE OF THOSE POWERS FROM BEING RESPONSIVE TO THE MAJORITARIAN WILL OF ITS CITIZENS.

The 1985 Act's mandate that all states provide for the disposal of low level radioactive waste, with its concomitant compelled exercise of legislative and executive powers in order to carry out that mandate, raises serious concerns about denying a republican form of government on the issue of the disposal of LLRW by state governments.

US Const, art IV, § 4, provides in pertinent part:

> The United States shall guarantee to every state in this union a republican form of government.

Chandler, Enslen and Renstrom, The Constitutional Law Dictionary, Volume 1, p 56 (1985), defines republicanism as:

> The doctrine of government by the people through majority rule ....

Thus, the essence of a republican form of government is one in which the citizens control their rulers and pass their own laws through the majoritarian process.

In Michigan, there has been a great deal of controversy concerning the disposal of LLRW. A large number of Michigan's citizens have made it clear that they do not want to see state government take responsibility for the disposal of LLRW within the state.

The 1985 Act, by forcing Michigan to implement federal policy regarding LLRW disposal, expend state monies, and be accountable to the federal government in the exercise of its legislative and executive powers to provide for the required LLRW disposal, rather than be accountable to the citizens of the state, through the majoritarian process, raises the following issue: Does this effectuate a denial of a republican form of state government to the citizens of the various states when those states are dealing with the issue of LLRW disposal?

An important federal question as to the limits imposed on Congress' commerce power by the Guarantee Clause of the

United States Constitution is raised by this case. Further, Professor Deborah Jones Merritt in her accomplished article, The Guarantee Clause And State Autonomy: Federalism for a Third Century, 88 Columbia Law Review 1 (1988), has perceptively analyzed why such a question is justiciable. Professor Merritt's article establishes that while the general rule is that conventional Guarantee Clause claims are not justiciable, the courts have been willing to entertain Guarantee Clause claims brought to protect state autonomy. As Professor Merritt notes:

> [Neither] Supreme Court precedent nor considerations of policy foreclose adjudication of claims that the federal government has violated the guarantee clause by intruding upon state autonomy. Merritt, at 70 (Emphasis added)

While controversy concerning the siting and building of what is perceived as

a noxious facility is not unique to LLRW (it is conceded that hazardous waste disposal facilities and prisons engender similar reactions from the public), what is unique is the fact that because of the 1985 Act, state government in the exercise of its executive and legislative powers does not have the discretion to respond to the majoritarian will of its citizens.

New York's Guarantee Clause claim is brought to protect its state autonomy. As such, it raises an important federal question of constitutional law that is justiciable.

III

THIS CASE RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW CONCERNING THE EXTENT TO WHICH GARCIA FORECLOSES COURTS FROM CONDUCTING AN INDEPENDENT DETERMINATION OF THE CONSTITUTIONALITY OF A STATUTE CHALLENGED ON FEDERALISM GROUNDS IN LIGHT OF THE PRINCIPLE OF JUDICIAL REVIEW ESTABLISHED IN THE LANDMARK CASE OF MARBURY v MADISON.

In Marbury v Madison, 1 Cranch 137, (1803), the Court held that it was the province and the duty of the judicial branch to say what the law is and said that to deny the permissibility of judicial review of the constitutionality of a congressional statute would be to say that the courts "must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions." Marbury, 1 Cranch at 178. Thus, Marbury stands for the doctrine that the courts,

not the legislature, must make the final determination whether, in a particular case, an act of Congress is in conflict with the constitution. See, Tribe, American Constitutional Law (2nd Ed), §§ 3-2, pp 23-26 (1988).

That the courts, through judicial review, are the final arbiter of the constitutionality of congressional enactments has been a basic premise of American jurisprudence for 188 years. Yet the reading of Garcia, urged by the Defendants in this case, and apparently adopted by the district court and circuit court, gives undue deference to the judgment of Congress in passing the legislation, and fails to give appropriate consideration to the Tenth Amendment and Guarantee Clause concerns of the states

and, in effect, forecloses the judiciary from conducting judicial review, through an independent determination of the constitutionality of the Commerce Clause legislation which is alleged to be in violation of state sovereignty.

While certainly this Court in Garcia, indicated that the political process is "... the principal and basic limit on the federal commerce power ..." Garcia, supra, at 556, it is questioned whether this Court intended the political process to be the exclusive or final guarantee of state sovereignty. For if that were the intention, then Garcia would deny in federalism cases the judicial review established by this Court in Marbury v Madison.

CONCLUSION

For the reasons noted in this brief, this case raises important questions of federal constitutional law. It is urged that the Court grant certiorari of this important case.

Respectfully submitted,

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No. 91-543

In The

Supreme Court Of The United States

October Term, 1991

THE STATE OF NEW YORK,
Petitioner,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,
Respondents,

The State of Washington; The State of Nevada; and The State of South Carolina,
Intervenor-Respondents

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITIONER STATE OF NEW YORK

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INTEREST OF THE AMICUS CURIAE

The State of Connecticut submits this brief as amicus curiae in support of the State of New York's petition for certiorari to review the decision of the United States Court of Appeals for the Second Circuit, *State of New York v. United States*, Nos. 91-6031, 91-6033, 91-6035, decided on August 6, 1991. The amicus supports the petition for certiorari because the issue presented in *State of New York v. United States* is of critical import to Connecticut and merits plenary review by the Court. An amicus brief filed by the State of Connecticut through its Attorney General does not require the consent of the parties. United States Supreme Court Rule 37.5.

In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act (Pub. L. 96-573) (hereinafter the "Policy Act"). This Act required states to provide for the disposal of certain classes of low-level radioactive waste generated within their borders, regardless of whether the waste was generated by private, federal or state entities.

In order to "induce" the states into providing disposal capacity, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Pub. L. 99-240, Title I) (hereinafter the "1985 Amendments"). This extraordinary statute, upheld in this case by the Court of Appeals for the Second Circuit, required states to take title and possession of low-level radioactive waste generated within the state or assume liability for damages any generator incurs if the states failed to provide disposal capacity for such waste by January 1, 1996. This statute simultaneously barred Connecticut from precluding, limiting or regulating the generation of low-level radioactive waste within its borders, while compelling the State to provide for disposal of such waste.

The 1985 Amendments thus imposed a tremendous economic and political burden on the State of Connecticut, forcing it to mobilize all of its sovereign powers to implement the Act's requirements. The State Legislature has enacted a series

of laws (Public Acts 83-2, 87-540, 88-230, 88-243, 88-361, 89-330, 90-98, 91-326, 91-337, Special Session 91-1) to implement the 1985 Amendments, including the creation and funding of a new state agency to oversee the siting and construction of a disposal facility. The agencies of the Executive branch of the State have promulgated extensive regulations (Regulations of Connecticut State Agencies (proposed) Sections 22a-163f-100 through 22a-163f-107 and 22a-163o-1) to enable them to oversee and administer the project. (See also Regulations of Connecticut State Agencies 22a-163f-1 through f-10, 22a-163l-1 and 22a-163t.) The Connecticut Hazardous Waste Management Service, the State authority charged with siting a low-level radioactive waste disposal facility, has already begun the monumental project of complying with Congress' fiat that the State must dispose of low-level waste.[1]

The Attorney General for the State of Connecticut supervises the provision of legal counsel to the above entities on the myriad laws and regulations that are involved in implementing this Act. The judicial system of the State of Connecticut will be required to condemn residential and agricultural land for the facility and will further be strained as the State may be obliged to sue its own citizens – adjacent landowners and citizens' groups – for acts of civil disobedience in order to implement the 1985 Amendments. Challenges to the State's implementation of the federal statute will be heard in State court at State expense.

The tasks placed upon the instrumentalities of the State of Connecticut by the 1985 Amendments have significantly imposed on the State's limited government resources. As of June 30, 1991, the State had expended $5,500,000 (five million, five hundred thousand dollars) on the first stages of

[1] The plans already drawn up by the Hazardous Waste Management Service include Site Selection Plan, Comment Response Document to the Draft Site Selection Plan, Public Participation Plan, Draft Site Screening Report, Quality Assurance Plan, Environmental Impact Study Plan, Generic Site Characterization Plan and Low-Level Radioactive Waste Management Updates.

administering the low-level radioactive waste responsibilities mandated by the 1985 Amendments.

The siting of a low-level waste disposal facility in Connecticut has already imposed – and will further impose – an enormous burden on the State and its citizens. Connecticut is the second most densely populated State in the nation. Three Connecticut towns were identified in June of 1991 by the Hazardous Waste Management Service as potential sites for Connecticut's low-level radioactive waste disposal facility. Forty-three thousand, three hundred and sixty-eight people live in those towns (*Connecticut State Register and Manual*, 1991, Connecticut Secretary of State). Many homeowners in those areas cannot sell their homes. Buyers are unwilling to locate in proximity of potential low-level radioactive waste disposal sites or are unable to obtain financing from reluctant lending institutions. Demographic considerations resulted in the selection of sites containing some of the only remaining prime farm land in those areas. Affected citizens have no ability to appeal to their state government, as Congress has preempted all state regulatory power while compelling the state itself to provide for disposal of low-level radioactive waste.

The State of Connecticut is only one of at least fourteen states that may be forced to construct a facility. Despite the tremendous amount of State resources and revenues expended to comply with the 1985 Amendments, the State's ability to construct and operate a safe disposal site in Connecticut on a timely basis is still uncertain. If a disposal site is not in operation in Connecticut by January 1, 1996, the 1985 Amendments will force the State to "take title" and possession to all the Class A, B and C low-level radioactive waste generated in Connecticut by privately owned utility companies and other entities.

SUMMARY OF ARGUMENT

Plenary review is needed in this case because the Second Circuit's decision represents a dramatic and unwarranted extension of the principles articulated by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Relying on *Garcia*, the Court of Appeals for the Second Circuit upheld the Low-Level Radioactive Waste Policy Amendments Act of 1985. Although the states are entirely preempted from regulating the generation of low-level radioactive waste, the 1985 Amendments compel the states themselves to provide for the disposal of all such waste or to take title and possession of the waste and be liable for any damages resulting from that waste. This statute reflects a unique and terribly burdensome encroachment on state sovereignty not envisioned by this Court in *Garcia* or by the framers of the Tenth Amendment.

This case represents a significant extension of *Garcia* and subsequent Tenth Amendment cases for several reasons.

- Rather than imposing federal regulation on state activities in an area which may or may not be a "traditional" governmental function, *Garcia*, *supra*, 469 U.S. at 547, Congress here has compelled the state itself, against its will, to enter the field of disposal of low-level radioactive waste, with draconian consequences if it fails to do so.

- Congress here did not merely extend to state or local governmental entities the same federal requirements that are imposed on private entities, nor did it merely compel states to impose federal standards or requirements on private businesses. Rather, in the 1985 amendments, Congress imposed a unique and onerous burden, not on the private or public entities that generate nuclear energy, but on the states themselves.

- A critical element of the statutes upheld in *Garcia* and other cases against Tenth Amendment challenges is notably absent from the 1985 Amendments. In the past, Congress has made clear that states retain the ultimate choice to refrain from regulatory responsibilities in an area involving federal regulation or from participation in federal programs if they do not want to accept the burdens that Congress imposed on them. While the choice of not participating in an important federal program may have been an undesirable one for the states, the choice was possible nonetheless. Under the 1985 Amendments, no state can choose to remove itself from the field of low-level radioactive waste. It can neither regulate nor prohibit production of such waste within its borders. It is simply required, by Congressional fiat, to provide for disposal of all Class A, B and C low-level waste produced by private or federal generators or take title to that waste.

The Court has recognized that there may be some "affirmative limits that the constitutional structure might impose on federal action affecting the States," *Garcia*, *supra*, 469 U.S. at 556, but it has never identified or defined those limits. This case presents the Court with a compelling need to do so.

In *Garcia*, the Court concluded that state participation in the federal political process would "ensure that laws that unduly burden the states will not be promulgated." 469 U.S. at 556. However, this is a case in which the federal political process plainly failed to protect state sovereignty. Far from being a "paragon[] of legislative success, promoting state and federal comity," *State of New York v. United States*, 942 F.2d 114, 119 (2nd Cir. 1991), here Congress itself opted out of an extremely difficult political and economic problem and imposed it on the states. Having promoted nuclear power through federal policies and having displaced the states from regulating in this field, Congress squarely placed the burden of disposing of this waste on the states themselves, notwithstanding the enormous political and economic consequences for the states and their localities. If the federal political process is sufficient to satisfy the Tenth Amendment in this case, then the Constitution places no limits on the draconian actions

which Congress – for its own political purposes – may wish to take against the states.

This Court should grant certiorari to review the decision of the Second Circuit and clearly define the limits to its decision in *Garcia*.

ARGUMENT

I. THE 1985 AMENDMENTS EXCEED THE AFFIRMATIVE LIMITS WHICH THE CONSTITUTION IMPOSES ON CONGRESSIONAL ACTION AFFECTING THE STATES.

For many years Congress encouraged the development of nuclear power as a means of securing a safe, dependable, domestic source of electrical generation. *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 557 (1978). Following Congress' lead, the utility companies in some states, like Connecticut, began an ambitious nuclear construction program in the 1970's and early 1980's. Today, Connecticut is host to four nuclear powered electrical generating stations, co-owned by a consortium of utility companies located in different states and providing electricity on an interstate transmission grid to all of New England.

A by-product of the nuclear generation of electrical energy is nuclear waste – high-level radioactive waste and low-level radioactive waste. The federal government has accepted responsibility for the disposal of high-level radioactive waste and low-level radioactive waste above Class C. Congress, however, through the Low-level Radioactive Waste Policy Amendments Act of 1985 (the "1985 Amendments") has imposed on the states the responsibility for disposing of all Class A, B and C low-level radioactive waste generated within its borders. 42 U.S.C. § 2021b *et seq.* The low-level radioactive waste generated by the nuclear power plants located in Connecticut accounts for 97 percent of the low-level radioactive hazard in this state.[2] Under the 1985 Amendments, Connecticut is now responsible for the disposal of all Class A, B and C low-level radioactive waste created by the generation of electricity in Connecticut by privately owned utility companies which distribute electricity on an interstate basis. Connecticut is also responsible for the disposal of the low-level radioactive waste created by all other private radioactive waste generators located in the state.[3]

Congress compelled compliance with the 1985 Amendments by imposing severe penalties for a state's failure to provide disposal capacity. "If a state . . . is unable to provide for the disposal of all such waste . . . each state . . . shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred . . . as a consequence of the failure of the state to take possession of the waste . . ." (42 U.S.C. § 2021e(d)(2)(C)). This coercive mandate, known as the "take title" provision, coupled with potentially enormous monetary liabilities, is unprecedented in United States history and contravenes the basic principles of federalism embodied in the Tenth and Eleventh Amendments.

In *State of New York v. United States of America*, 942 F.2d 114 (2nd Cir., 1991), the Court of Appeals determined that the 1985 Amendments did not violate the states' sovereign interests reserved to them under the Tenth Amendment. Instead, relying on *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), for the proposition that state sov-

[2] *Low-Level Radioactive Waste Management in Connecticut – 1989 and Projections*, Section 2.2, Table 2-4 1990, Connecticut Hazardous Waste Management Service.

[3] The State of Connecticut generates a minimal amount of low-level radioactive waste at state-owned-hospitals and universities. The State of Connecticut generated only seven-tenths of one percent of the total volume of low level radioactive waste generated in the state and only one-thousandth of one percent of the radioactive hazard. *Low-Level Radioactive Waste Management in Connecticut – 1989 and Projections*, pp. 2-16 through 17, Table 2-5, (1990) (Connecticut Hazardous Waste Management Service).

ereignty is protected by the federal political process itself, the Court held that since "Congress acted only after robust debate and a clearly articulated acceptance of NGA and other state-based recommendations," the 1985 Amendments did not violate the constitution. *State of New York v. United States, supra*, 942 F.2d at 120.

In *Garcia*, however, this Court specifically noted, without identifying or defining them, the possibility of "affirmative limits" which "the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Garcia, supra* 469 U.S. at 556. Again in *South Carolina v. Baker*, 485 U.S. 505, 513 (1988), this Court "left open the possibility" that there exist "constitutional limitations" on Congress' power over the states independent of the national political process. Nonetheless, the Court of Appeals in this case simply extended *Garcia* to uphold the unique intrusion on state sovereignty reflected in the 1985 Amendments, without considering whether the Amendments exceeded the "affirmative limits" of the constitution.

This Court has previously identified two situations in which Congressional action may directly affect states' sovereignty:

1) Congress' regulation of "state activities" and

2) Congressional attempts to "control or influence the manner in which States regulate private parties." *South Carolina v. Baker*, 485 U.S. at 514. The 1985 Amendments, however, reflect Congressional action in a totally new and different direction – compelling state action in a field the states have not previously entered and in which private entities are not subject to the same Congressional compulsion.

Unlike the Fair Labor Standards Act discussed in *Garcia*, or the Tax Equity and Fiscal Responsibility Act of 1982 examined in *South Carolina v. Baker*, the 1985 Amendments do not simply extend federal regulation of commerce to state

entities or activities. Instead, the 1985 Amendments explicitly compel each state to commence disposing of low-level radioactive waste by January 1, 1996. Nor is this an instance where Congress has sought to "influence" state regulation of private entities, as did the statutes construed in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982). Although Congress' power under the Commerce Clause is not confined to the private sector (*E.E.O.C. v. Wyoming*, 460 U.S. 226, 250-51 (1983) (Stevens, J. concurring)), the 1985 Amendments impose the disposal obligation only on states and not on private waste generators. The 1985 Amendments, therefore, go far beyond the use of "state . . . machinery" in the regulation of private entities "to advance federal goals," approved by this court in *FERC v. Mississippi, supra*, 456 U.S. at 759, and do far more than "seek to control or influence the manner in which states regulate private parties." *South Carolina v. Baker, supra*, 485 U.S. at 514.

Congress, through the transfer of the ownership and possession of radioactive waste generated by private enterprise to the States, has not simply displaced "elements of state sovereignty." *Garcia, supra*, 469 U.S. at 550. Nor do the 1985 Amendments merely commandeer "the legislative process of the states by directly compelling them to enact and enforce a regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., supra*, 452 U.S. at 288. Instead, Congress has actually commandeered the states themselves, subjugating the state, its machinery of government and its treasury to private waste generators. Such an action finds no support in the Constitution and is "referable to no power granted to Congress over the subject . . . ." *Coyle v. Smith*, 221 U.S. 559, 574 (1911).

This Court has never sanctioned the "compelled exercise" of a state's "sovereign powers." *FERC v. Mississippi, supra*, 456 U.S. at 769. To the contrary, this Court has recognized choice as an essential element of state sovereignty.

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else – including the judiciary – deems state involvement to be.

Garcia, supra, 469 U.S. at 546.

State choice also embraces the converse of the above statement – the freedom to choose not to engage in an activity. This Court has repeatedly upheld federal statutes that affected state interests, in part because they maintained the states' freedom to refrain from the activity in which Congress authorized state participation.[4] The states, however, cannot withdraw from the federal low-level radioactive waste program. Under the 1985 Amendments, the states have only Hobson's choices: dispose of the waste, take title to it and possess it or pay any damages resulting from the waste. The 1985 Amendments compel this state action even though a state may neither preclude nor regulate nuclear power plant generation of low-level radioactive waste (42 U.S.C. § 2021(c)).

The inability of a state to prohibit or limit generation of low-level radioactive waste – the source of the underlying problem – accentuates the inequity of thrusting title, possession, liability and responsibility for disposal upon the states. This inequity is compounded by the fact that Congress also required the states to be responsible for disposal of and liable for, certain low-level radioactive waste generated by the agencies of the Federal Government (42 U.S.C. § 2021c(a)(1)(B)).

Hence, the 1985 Amendments direct and compel state action in a manner never before considered by this Court. The Court of Appeals' reliance on *Garcia* to uphold this statute dramatically restricts the Tenth Amendment's protection of state sovereignty in a manner never intended by this Court in *Garcia*.[5]

II. THE NATIONAL POLITICAL PROCESS FAILED TO PROTECT THE STATES FROM UNDULY BURDENSOME FEDERAL REGULATION AS POSTULATED BY THIS COURT IN *GARCIA*.

In its review of the 1985 Amendments, the Court of Appeals determined that it was sufficient that the federal political process carried the 1985 Amendments through Congressional debate and vote to their final enactment into public law: "The political process ensures that laws that unduly burden the states will not be promulgated. *Garcia,* 469 U.S. at 556." *State of New York v. United States, supra,* 942 F.2d at 120. The Court of Appeals, however, failed to "tailor" its Tenth Amendment analysis "to compensate for possible failings in the national political process . . ." *Garcia, supra,* 469 U.S. at 554, 556.

[4] See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act allows States to refrain from regulatory responsibilities in favor of federal regulatory agency); *Federal Energy Regulatory Com'n. v. Mississippi*, 456 U.S. 742 (1982) (states may decline to accept conditions imposed by Public Utilities Regulatory Policies Act by abandoning regulation of the field); *United Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982) (states can avoid application of the Railway Labor Act by declining ownership of an interstate railway); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 581 (1985) (state can avoid application of the Fair Labor Standards Act by not requiring state employees to work overtime); *South Carolina v. Baker*, 485 U.S. 505 (1988) (states may avoid issuing registered bonds under Tax Equity Fiscal Responsibility Act by foregoing favorable tax treatment afforded registered bonds).

[5] The District Court plainly recognized that this case represented a significant extension of the principles articulated in *Garcia*, noting as it upheld the 1985 Amendments, that "it may well be this case which results in *Garcia* being overturned." *State of New York v. United States*, 757 F.Supp. 10, 13 (N.D.N.Y. 1990).

Contrary to the Court's analysis, the 1985 Amendments either contravene or constitute an exception to the general rule of *Garcia* that the federal political process will protect the states from "unduly burden[some]" legislation. Because Congress did not wish to take responsibility for the myriad problems associated with the disposal of low-level radioactive waste, the federal political process specifically and intentionally "unduly" burdened the states with the task. In the 1985 Amendments, Congress did not recognize "the special and specific position in our constitutional system" occupied by the states, nor did "the internal safeguards of the political process" protect the states' sovereignty in the manner envisioned by the Constitution. *Garcia, supra,* 469 U.S. at 556. Instead, in this instance, the federal political process was specifically employed to shift directly to the States a federal responsibility in a difficult political area. One of the "horrible possibilities that never happen in the real world," actually happened here. *New York v. United States,* 326 U.S. 572, 583 (1946) (quoted in *Garcia,* 469 U.S. at 556).

There was a failure of the process-based protections relied on in *Garcia.* The "[m]embers of Congress . . . elected from the various States" voted, not as representatives of the states, but as "Members of the Federal Government." *Garcia,* 469 U.S. at 564-565 (Powell, J. dissenting).

> One can hardly imagine this court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights. . . ."

Garcia, 469 U.S. at 565 n. 8 (Powell, J., dissenting).

Responsibility for disposal of low-level radioactive waste entails both political and legal liability and also horrendous economic burdens. The search for an appropriate site for

a waste disposal facility, the testing of potential sites, the displacement of homeowners, farmers, and parkland, and the construction of a proper and safe facility is an enormously complicated, expensive, technologically difficult and politically explosive process. Congressional delegation of that responsibility to the states requires the states' government to exercise judicial, executive and legislative powers to fulfill federal policies, blurring the line of proper political responsibility and shielding Congressional policy makers from accountability for unpopular decisions. *See* Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century,* 88 Colum. L.Rev. 1 (1988).

The federal political process, through the coercive nature of the 1985 Amendments, upset the federal-state relationship established by the Constitution.

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the states and the federal government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L.Ed.2d 171 (1985) quoting *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 572, 105 S.Ct. 1005, 1028, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting).

Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991).

As this Court recently reiterated in *Gregory v. Ashcroft, supra,* 111 S. Ct. at 2399, one of the fundamental principles of government is the Constitutional establishment of ". . . a system of dual sovereignty between the states and the federal government." The dual system of sovereigns embodied in the Constitution reflected the framers' distrust of an omnipotent, federal government.

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. The *Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison).

The 1985 Amendments are inconsistent with the constitutional balance of powers between the states and the federal government. The coercive imposition on the states of congressional policies that entail political and economic liabilities threatens the fundamental concept of separate sovereign entities coexisting under a constitutional framework. The 1985 Amendments are destructive of state sovereignty and are the result of a failure of the national political process to protect the "States as States." *Garcia's* strict standard for review of claimed Tenth Amendment violations must be "tailored" in this case "to compensate" for Congress' failure to respect state sovereignty. This Court's review of the Second Circuit's application of *Garcia* is therefore warranted.

CONCLUSION

For the reasons contained herein, Connecticut urges this Court to grant certiorari to review the decision of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

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NO. 91-543

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK,
Petitioner,

v.

THE UNITED STATES OF AMERICA, et al.,
Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,
Intervenors.

AMICUS BRIEF IN SUPPORT OF PETITIONER NEW YORK FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE STATES OF OHIO, ALABAMA, ALASKA, ARIZONA, GUAM, ILLINOIS, INDIANA, MAINE, NEBRASKA, NEW JERSEY, PENNSYLVANIA, RHODE ISLAND AND SOUTH DAKOTA

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STATEMENT OF INTEREST

Amici have a manifest interest in questions that lie at the core of state sovereignty interests. *Amici* believe the decision below is a precedent that profoundly impacts the nature of federal - state relations. As explained below, the decision of the Second Circuit sanctions a statute that exceeds congressional power violates the Tenth Amendment, Guarantee Clause and Takings Clause and shifts substantial liabilities from Congress, and from an industry it has traditionally protected, onto States. *Amici* include States that have entered into compacts under the Low Level Radioactive Waste Policy Amendments Act of 1985, as well as unaligned States such as Petitioner New York. The provision affects compact States and unaligned States alike. *Amici* accordingly submit this brief to assist the Court in the resolution of the States' rights issues in this case.

SUMMARY OF ARGUMENT

The Take Title Provision[1] involved in this case should be held unconstitutional because it tramples on state sovereignty by putting state legislative and executive branches squarely under the thumb of Congress.

The Take Title Provision compels a State, on and after January 1, 1996, to take title to, possession of and liability for low-level radioactive waste generated within its borders upon request by the generator, unless the State has developed or secured access to a disposal facility to serve generators. This statute will force States to take waste not only from commercial generators, but also from some of the Federal Government's generators.

In addition to the reasons put forth by the State of New York in its Petition for a Writ of Certiorari, *amici* offer the following four (4) grounds which warrant consideration of

[1] Section 5(d)(2)(C) of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("the 1985 Act"), 42 U.S.C. 2021e(d)(2)(c).

this case by the Court.

First, the provision is "punitive" - in the words of its author - and constitutes a taking of state property for which the Federal Government does not provide just compensation.

Second, the decision below improperly expands the scope of commerce power recognized by this Court by upholding a provision that effectively compels a State to engage in commercial activity, regardless of whether the State desires or is ready to do so. The Take Title Provision improperly crosses the line between encouraging and compelling a State to undertake sovereign action to engage in a field of commerce. The provision is therefore beyond congressional power.

Third, the decision below ignores the teachings of *Gregory v. Ashcroft*, 11 S.Ct. 2395 (1991), that the Tenth Amendment reserves to the States, and the Guarantee Clause guarantees them, "authority that lies at the heart of representative government," which includes the power to decide whether and when to pass and to execute laws to establish a State as a provider of waste management serves. The Guarantee Clause guarantees to the States a "Republican Form of Government", U.S. Const., Art. IV, Section 4, which is one in which "the people control their rulers." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

The Take Title Provision, however, is more "intrusive on state sovereignty" - according to the Congressional Research Service - than any other statute reviewed by a court. The compulsory nature of the provision compels state legislatures and executives to make and implement decisions at the beckoning of the Federal Government.

The Take Title Provision has the effect of depriving citizens of control over their state government. It has the effect of compelling a State to rearrange its legislative agenda and to pass laws to establish a means for the State to collect, to transport, to treat, to store and/or to dispose of waste.

It has the effect of compelling a State to use its executive powers to implement such laws, and its judicial powers to resolve disputes. The provision displaces citizen control over how States disburse state-generated tax funds. States are accountable not to their citizens, but to Congress.

The decision below sets a precedent for congressional acts compelling a State to provide not only waste disposal services, but also power generation, hospitals or other services which Congress may feel are inadequately served by the free market. The decision also frustrates state innovation such as encouraging the development of private nuclear waste disposal utilities.

The fourth reason the Court should review this controversy now is that the provision threatens serious disruption to the stability of compacts, inasmuch as its legislative history suggests congressional consent to the compacts is conditioned on States strictly complying with the provision. While States are generally progressing with the development of disposal facilities, it is anticipated that not all States will be able to develop or to obtain access to a disposal facility by 1996. A self-executing termination of consent would be highly disruptive to compacts under the 1985 Act.

In sum, the Take Title Provision exceeds congressional power, tramples on state sovereignty and constitutes a taking of state property for which the federal government has not provided compensation. Because the decision of the Court of Appeals for the Second Circuit upholds the Take Title Provision, *amici* respectfully request that the Court grant New York's Petition for a Writ of Certiorari.

ARGUMENT

INTRODUCTION

In 1980 the National Governors' Association's Task Force on Low-Level Radioactive Waste, acting in response to a perceived national shortage of disposal facilities for low-level radioactive waste, recommended that "[e]ach state accept primary responsibility for the safe disposal of low-

level radioactive waste generated within its borders, except for waste generated at federal government facilities."[2] The NGA Task Force Report recommended the formation of interstate compacts to develop regional facilities. Congress adopted the NGA Task Force Report recommendations in the Low-Level Radioactive Waste Policy Act of 1980 ("1980 Act"), P.L. 96-513, 94 Stat. 3347, except the 1980 Act also declared a policy of States having responsibility for some of the Federal Government's waste.

The 1980 Act declared that "[i]t is the policy of the Federal Government that - (A) each State is responsible for providing for the availability of capacity . . . for the disposal of low-level radioactive waste generated within its borders," including some waste generated by the Federal Government. P.L. 96-573, 94 Stat. 3348. The 1980 Act encouraged the development of regional disposal facilities under interstate compacts and allowed such compacts to exclude out-of-state waste after January 1, 1986, provided the compact obtained congressional consent. Thus, after January 1, 1986, compacts which included the States of South Carolina, Nevada and Washington, where the nation's only disposal facilities were located, could exclude out-of-compact waste from these facilities once they obtained congressional consent.

In 1984 Representative Udall distributed to the States draft amendments to the 1980 Act which attempted to give more assurance that States would develop disposal facilities. A working group under the National Governors' Association developed an "unofficial counter-proposal" that served as a basis for the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act"), 42 U.S.C. 2021b to 2021j. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 1 at 14, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974, 2976.

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[2] National Governors' Association, *Low-Level Waste: A Program for Action, Final Report of the National Governors' Association Task Force on Low-Level Radioactive Waste Disposal* 6 (1980) ("NGA Task Force Report").

The 1985 Act imposes a schedule for the development of disposal facilities. Generators within States not meeting the schedule face denial of access to the three (3) existing facilities and or imposition of surcharges on their disposal fees. The 1985 Act also prevents the States of South Carolina, Nevada and Washington from interfering with out-of-state access to the private facilities in their States until January 1, 1993, when the 1985 Act allows their compacts to close their compact borders.

However, Congress added the Take Title Provision to the 1985 Act in the final hours of the legislative session without the same involvement of the National Governors' Association. The Take Title Provision provides as follows:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(c).[3]

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[3] This *amicus* brief takes no position on whether the Take Title Provision applies to South Carolina, Washington and Nevada, all of which have intervened in this case in support of the United States, or whether that provision applies to any State in a compact with the intervening States. Nothing in this *amicus* brief is intended to affect a State in a compact with the intervening States regarding applicability of the Take Title Provision.

The author of the Take Title Provision described it as "a very far reaching, difficult, and punitive provision." 131 Cong. Rec. S18113 (remarks of Sen. Johnston). Senator McClure, chair of a committee having jurisdiction over the legislation, doubted its constitutionality. *Id.*, at S18114, S18118. Representative Markey concluded the provision "may not pass a constitutional challenge." *Id.*, at H13077. A Congressional Research Service analysis requested by Representative Markey concluded that the provision is unprecedented and raises "constitutional issues" under the Tenth Amendment. *Id.* The analysis found that "[t]here does not appear to be pertinent judicial precedent that has upheld in the face of 10th Amendment objections a federal mandate as intrusive on state sovereignty as the [federal compulsion] at issue here." *Constitutional Issues Raised By the Imposition of Liabilities on the States Under A Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980,* Memo from Congressional Research Service to House Committee on Energy and Commerce, December 16, 1985, page CRS-5.[4]

While States are generally progressing with development of disposal facilities, it is anticipated that not all States will be able to develop or obtain access to a disposal facility by 1996. The Take Title Provision is a strict liability statute that harms States.

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[4] The 1985 Act has a second provision that presents constitutional concerns. Title 42 U.S.C. Section 2021c(a)(1) provides that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States," for the disposal of three (3) classes of low-level radioactive waste generated within the State by private and some Federal Government generators. See page 3 of New York's Petition for a Writ of Certiorari.

To the extent, if any, that this provision may be construed as establishing a cause of action for failure of a State, including any State not subject to the Take Title Provision, to comply with this provision, it also unconstitutionally infringes on state sovereignty in the manner described herein for the Take Title Provision.

I. The Second Circuit's Decision Improperly Expands The Scope Of Commerce Power Recognized By This Court By Allowing Congress To Compel A State To Become A Market Participant.

As the State of New York has argued in its petition to the Court, the Take Title Provision imposes an unprecedented mandate upon the States, compelling them to exercise their sovereign powers to implement a federal regulatory scheme. In addition, the provision imposes a more particular burden on the States, compelling them to participate in a market of commerce, regardless of whether they desire or are prepared to do so.

The Commerce Clause provides that "Congress shall have Power . . . to regulate Commerce . . . among the several States . . . . " U.S. Const., Art. I, Section 8. Neither the text of the clause nor precedent from this Court allow Congress to compel a State to become a market participant, regardless of whether the State desires or is ready to do so. Thus, Congress lacks power to impose this kind of liability on States.

The power to regulate commerce presupposes the existence of a voluntary participant in commerce. Nowhere in the phrase "to regulate commerce" can there be found authority for compelling a person or State to engage in commerce as a market participant, even if the State desired or was ready to do so. Commerce by definition is a voluntary activity. "Commerce" means the "exchange of goods, productions or property of any kind; the buying, selling, and exchanging of articles." Black's Law Dictionary 269 (6th ed. 1990). Exchanging, buying and selling are all voluntary activities.

The Court has found "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc. v. Stake,* 447 U.S. 429, 437 (1980). Moreover, the Court continues to support "the long recognized right of trader or manufacturer, engaged in an

entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.*, at 439, quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).[5] The power to decide *with whom* to deal is meaningless unless it also includes the power to decide *whether* and *when* to deal.

The Court should grant *certiorari* because the decision below improperly expands the scope of congressional commerce regulation recognized by this Court. The provision is beyond congressional power. It encourages Congress to believe it can compel States to provide not only waste disposal facilities, but also hospitals, power plants and whatever other services Congress may feel are lacking in the marketplace.

II. The Second Circuit's Decision Ignores The Principle Set Forth By This Court In *Gregory v. Ashcroft* That The Tenth Amendment Reserves To The States, And The Guarantee Clause Guarantees Them, "Authority That Lies At The Heart Of Representative Government," Which Includes The Power To Decide Whether And When To Pass And Execute Laws To Establish The State As a Provider Of Waste Management Services.

The Guarantee Clause of the U.S. Constitution ensures that citizens have proper control over their state governments. That clause provides that "the United States shall guarantee to every State in this Union a Republican Form of Government . . . " U.S. Const., Art. IV, Section 4. "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers." Merritt, *The Guarantee Clause*

[5] This *amicus* brief takes no position on whether a State not belonging to a compact may exclude out-of-state low-level radioactive waste under *Reeves, supra*. Nothing in this *amicus* brief is intended to affect any State in taking a position for or against such exclusion.

and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 23 (1988).

In *Gregory v. Ashcroft*, ____ U.S. ____ , 111 S. Ct. 2395 (1991), the Court recently invoked the plain statement rule, a rule of statutory interpretation, to avoid a "potential constitutional problem" presented by a requested application of the Federal Age Discrimination in Employment Act of 1967 (ADEA) to preempt a mandatory retirement provision for judges in a state constitution. The Court reviewed its precedents and concluded that the Guarantee Clause is a shield against congressional intrusion on state authorities at the heart of representative government:

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. *It is an authority that lies at " 'the heart of representative government.' "* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantees to every State in this Union a Republican Form of Government."

Id (citations omitted) (emphasis added).

Thus, the Court narrowly construed the ADEA and upheld the state mandatory retirement provision.

The lower court's decision ignores the teachings of *Ashcroft* that the Guarantee Clause is a shield against congressional infringement on the authority of a State to make decisions that lie "at the heart of representative government." *Id.*[6] The heart of state representative government includes the power to set a legislative agenda and to decide whether and when to pass laws, no less when

[6] *Ashcroft* was decided after oral argument of this case in the Second Circuit.

the State is to decide whether or when to become a market participant. The decision below, however, renders the Guarantee Clause powerless to prevent Congress from forcing States to become agents of the federal government.

The compulsory nature of the Take Title Provision deprives citizens of control over state government. The provision has the effect of compelling a State to alter its legislative agenda and to pass laws to establish a means for the State to collect, to transport, to treat, to store and or to dispose of waste. It has the effect of compelling a State to use its executive powers to implement such laws, and its judicial powers to resolve disputes. It displaces citizen control over how States disburse state-generated tax funds. States are accountable not to their citizens, but to Congress.

The Tenth Amendment, however, reserves to the States and the Guarantee Clause guarantees them the power to decide whether and when to pass and to execute laws to provide waste management services as a market participant. These decisions lie "at the heart of representative government." *Ashcroft, supra.* "Federal attempts to appropriate state governmental resources [to force implementation of federal policies] deny the states a republican form of government." Merritt, 88 Colum. L. Rev., at 61.

The Court "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Federal Energy Regulatory Commission v. Mississippi,* 456 U.S. 742, 761-762 (1982). The Court should grant *certiorari* because the decision below improperly goes a giant step further, contrary to *Ashcroft,* in that it upholds a statute compelling a State to promulgate and execute laws establishing the State as a provider of waste services.

III. The Take Title Provision - Described By Its Author As "Punitive " - Constitutes A Taking Of State Property For Which The Federal Government Does Not Provide Just Compensation In Violation Of The Fifth Amendment.[7]

The Takings Clause of the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. States have a right to just compensation for a federal taking of state property as the term "private property" includes property of State and local governments. *United States v. 50 Acres of Land,* 469 U.S. 24, 31. The constitutional requirement of just compensation derives its content from basic equitable principles of fairness. *United States v. Fuller,* 409 U.S. 488, 490.

A permanent physical occupation of real property is a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 434 (1982). The Takings Clause protects not only real property but also personal property and intangible property rights. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1003 (1984) (right to trade secrets protected). The Court has found that inadequate compensation of a public utility under a rate statute may be a taking. See *Duquesne Light Co. v. Barasch,* 109 S.Ct. 609, 616 (1989).

The Take Title Provision mandates a taking of state property. The requirement that a State take possession of waste may mean that the State must employ its vehicles to pick up and transport the waste and its facilities to store and or dispose of the waste. Such a forced use of state vehicles is a taking of state personal property. *Ruckelshaus, supra.* Such a permanent, forced possession of state property to store and or dispose of waste is a *per se* taking of state real property.[8] *Loretto, supra.* A taking also occurs when

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[7] Pennsylvania does not join Section III.

[8] This controversy should be heard now for the additional reason that the Take Title Provision, if left to stand, risks serious disruption to the compact system under the 1985 Act. A failure of a compact State to

the provision transfers title to the State. The provision forces on a State an undesirable, burdensome property interest.

The Take Title Provision violates the Takings Clause by mandating a taking of state property without just compensation by the Federal Government. The provision expressly places on a State liability:

> for all damages directly or indirectly incurred by [a] generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(C). Thus, by the terms of the statute, Congress mandated that States have liability for any failure to take possession.

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[8] *Footnote 8 cont.*
comply with the Take Title Provision, for whatever reason, risks a self-executing termination of congressional consent to its compact. Congress' consent to compacts has been "subject to" the 1985 Act. See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, P.L. 99-240, 99 Stat. 1859 (passed concurrent with 1985 Act.) "[T]he failure to comply voluntarily with the requirement that title and possession be taken - one of the principal conditions of consent to any regional compact - means that the entire compact in which such State is a member will be null and void, invalid, and cannot be implemented." 131 Cong. Rec. S18252 (remarks of Sen. Simpson). The legislative history indicates an expressed intent to preclude States from challenging the constitutionality of the provision as a defense to an enforcement action.

Termination of consent would be highly disruptive to the compact system under the 1985 Act. See *Tobin v. United States*, 306 F.2d 270, 272-273 (D.C. Cir. 1962), *cert. den.*, 371 U.S. 902 (1962) ("suspicion of even potential impermanency would be damaging to the very concept of interstate compacts"). Congressional consent expressly allows compacts to exclude out-of-compact waste, which is a centerpiece of the 1985 Act. The Take Title Provision, if left to stand, risks serious disruption to the compact system under the 1985 Act.

The structure of the 1985 Act also shows that Congress mandated that States assume the full burden of the Take Title Provision. The provision is a deadline to compel state development of disposal facilities. Requiring States to take title to, possession of, and liability for waste as of January 1, 1996 is consistent with the plan of the 1985 Act that States have disposal facilities available by then.

Moreover, the legislative history expressly shows that Congress intended States to assume all obligations and liabilities under the provision. According to its author, the provision "insures that the State will not be able to avoid the financial consequences of failure to provide adequately for the disposal" of private, state and some federal waste. 131 Cong. Rec. S18113 (remarks of Sen. Johnston). "It is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that." *Id.*

In light of the language of Take Title Provision, the structure of the 1985 Act and the legislative history, it is inconceivable that Congress intended to have the federal government reimburse the States for takings under the provision. There is an unambiguous intention to shift federal and private liabilities to the States. See *Preseault v. Interstate Commerce Commission*, 110 S.Ct. 914, 922 (1990) (inquiry is whether Congress exhibited "unambiguous intention to withdraw Tucker Act remedy" for compensating takings). Thus, the Take Title Provision violates the Fifth Amendment requirement to provide States with just compensation for takings of state property.

The Take Title Provision is particularly inequitable when compared to congressional mandates to the federal government. 42 U.S.C. 10222(a)(1) (Department of Energy required to take generator's high-level radioactive waste only after DOE facility is available). Moreover, Congress imposes this burden on a State to assist a federally - promoted industry. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1978) (Atomic Energy Act "encouraged the private sector to become involved in the development of atomic energy for peaceful purposes"). The

duty is imposed in an area where the Court has found little state regulatory authority. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Com'n.*, 461 U.S. 190 (1983). Some States have called on Congress to expressly give States greater authority in low-level radioactive waste management, particularly in light of the burdens of 1985 Act, and such authority has not been given. See, *e.g., Written Testimony of James O. Payne, Jr.*, Hearing Before the Subcommittee On Energy and the Environment, House Committee on Interior and Insular Affairs, on H.R. 645, Radiation Protection Act of 1991. It is imposed in an area where the federal government itself has encountered difficulties in waste management. See *Managing Commercial High-Level Radioactive Waste, U.S. Congress Office of Technology Assessment (April, 1982) p. 10 ("The greatest single obstacle* that a successful waste management program must overcome *is the severe erosion of public confidence in the Federal Government* that past problems have created") (emphasis in original).

Thus, the Court should grant *certiorari* because the decision below allows Congress to shift liabilities from itself, and from an industry it has traditionally protected, onto States in violation of the Takings Clause.

CONCLUSION

Amici respectfully request that the Court grant New York's Petition for a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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Nos. 91-543; 91-558; 91-563

IN THE

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Nos. 91-543; 91-558; 91-563

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

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against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Entries.

1990		
Feb 12	1	Complaint, issued summons & returned to atty f/service
Mar 1	2	Original Summons & Affidavit of Svce of Summ/Complaint upon listed Defts, by mail on 2/14/90
Mar 16	3	FEDERAL Defts notice of appearance
Apr 25	4	DEFTS Letter stating parties have agreed to a 30 day extension of time for Defts to respond to Pltfs complaint
May 23	5	STIP/ORDER 5/23/90 (CGC) Defts time to Answer is extended to 6/8/90
Jun 8	6	Proposed Intervenors' (Movants) Notice of Motion for Leave to Intervene, returnable *7/6/90*; Supporting Affidavit
Jun 8	7	Proposed Intervenors' Memo of Law
Jun 14	8	Proposed Intervenors' (Movants) Letter to Clerk confirming adjournment of their motion from 7/6/90 to *7/20/90*
Jun 11	9	DEFTS Notice of Federal Defts' Motion to Dismiss returnable *8/17/90*
Jun 11	10	DEFTS Motion to Dismiss
Jun 11	11	DECLARATION of Louise Milkman in support of defts' motion to dismiss
Jun 11	12	DEFTS Memorandum of Law
Jul 6	13	AFFIDAVIT of Cindy M. Monaco in opposition to motion to intervene
Jul 6	14	PLTF Cortland County's Memo of Law in Opposition to Motion for Leave to Intervene
Jul 9	15	PLTFS Answering Affidavit in Opposition to Intervention
Jul 9	16	PLTFS Memorandum of Law in Opposition to Motion for Leave to Intervene

Jul 9	17	PLTFS Certificate of Svce of Motion Opposing papers upon Counsel on 7/6/90
Jul 3	18	DEFTS Notice to Court stating No Opposition to motion for leave to Intervene by Movants and to notify Court of an error of citation in the Defts' Memo is Support of motion to Dismiss, filed on 6/8/90: on page 3, line 17 of that brief, the citation to 10 CFR part 24 (re: incineration) should be to 10 CFR Section 20.305
Jul 20		MOTION: by Proposed Intervenors for Leave to Intervene = DENIED; Intervenors allowed to proceed *amicus curiae* status, and file a brief
Jul 23	19	LETTER from AAG Berens adjourning motion from 8/17/90 to *10/5/90* State will submit opposing motion papers by 9/7/90
Jul 23	20	ORDER 7/20/90 (CGC) Movants' motion for leave to intervene is DENIED, except that (1) it is GRANTED to the extent of granting leave to movants to submit a single memo of law on the motion to dismiss and (2) granted to the extent of granting leave to movants to submit a single memo of law on pltfs motion for summary judgment
Aug 17		MOTION: Adj. to *10/5/90*
Aug 30	21	Proposed Intervenors (Movants) Notice of Motion for Leave to Intervene, returnable *9/21/90*
Aug 30	22	Movants Supporting Affidavit by Christine Gregoire
Aug 30	23	Movants Supporting Affidavit by Jerry Griepentrog
Aug 30	24	Movants Supporting Affidavit by Michael Jarrett
Aug 30	25	Movants Memo of Law

Sep 7	26	PLTF County of Allegany's Affidavit in Opposition to Deft USA's M/Dismiss and in Support of M/Summ/Judgment of Pltf NY
Sep 7	27	PLTF County of Allegany's Memo of Law
Sep 7	28	PLTF County of Cortland's Affidavit in Opposition to to M/Dismiss
Sep 7	29	PLTFS County of Cortland's Affidavit os Clarence Rappleyea in Support of Pltfs Motion
Sep 7	30	PLTF County of Cortland's Memo of Law in Opposition to Fed/Defts M/Dismiss
Sep 7	31	PLTF County of Cortland's Affidavit in Opposition to Movants M/Intervene
Sep 7	32	PLTF County of Cortland's Memo of Law to M/Intervene
Sep 7	33	PLTF NYS's Affidavit in Opposition to Movants M/Intervene
Sep 7	34	PLTF NYS's Memo of Law
Sep 6	35	AMICUS CURIAE Memo of Law in Support of Defts M/Dismiss
Sep 7	36	PLTF NYS's Notice of Motion for Summ/ Judgment, returnable *10/5/90*; Supporting Affidavit
Sep 7	37	PLTF NYS's Rule 10j Statement
Sep 7	38	PLTF NYS's Memo of Law in Opposition to Defts M/Dismiss and in Support of its M/Summ/Judgment
Sep 14	39	Proposed Intervenors' (States of Washington, Nevada, & South Carolina) Notice of Motion to Dismiss, returnable *10/5/90*
Sep 14	40	Proposed Intervenors' "States", Supporting Memo of Law
Sep 14	41	Transcript of Proceedings held before Judge Cholakis on 7/20/90
Sep 21	42	PLTF NYS's Affidavit in Opposition to M/Dismiss by "States"

Sep 21	43	PLTF NYS's Memo of Law
Sep 21		MOTION: by Proposed Intervenors for leave to Intervene = Court GRANTS motion to Intervene, motions returnable 10/5/90 are adjourned to *11/2/90*; answering papers to be filed by 10/19/90
Sep 24	44	Letter from Atty Milkman re: personal appearance not necessary for Motion term of 9/21/90
Sep 24	45	ORDER 9/21/90 (CGC) the Motion for Leave to Intervene is GRANTED; movants are granted intervention in this action as parties deft
Oct 4	46	STIP/ORDER 10/3/90 (CGC) Defts' & Intervenors' Response to Pltfs' Motions for Summ/Judgment/Oppositions to Defts' Motion to Dismiss will be served on all parties & Court by overnight mail on 10/26/90; Pltfs' Reply papers will be served on all parties & Court by overnight mail on 11/21/90; Oral argument set for 12/7/90
Oct 5		MOTIONS: Adj. to *11/2/90*
Oct 26	47	Memo of Law of *AMICUS CURIAE* in Opposition to NYS's Motion for Summ/ Judgment w/Exhibits
Oct 29	48	DEFTS (Fed) Cross-Motion for Summ/Judgment and in Opposition to Pltfs Cross-Motions for Summ/Judgment and in reply to Pltfs' Opposition to Defts' Motion to Dismiss, returnable *12/7/90*
Oct 29	49	DEFTS Memo of Law
Oct 29	50	DEFTS Declaration of Louise Milkman in Support of Motion for Summ/Judgment
Oct 29	51	DEFTS Rule 10j Statment
Oct 29	52	DEFTS Compiled Declarations & Exhibits

Oct 16	53	CORRECTED ORDER 10/16/90 (CGC) Granting Motion of "States" to Intervene (caption on Order corrected stating "States" as the Movants)
Oct 30	54	INT/DEFTS "States" Notice of Motion for Summ/Judgment, returnable *12/7/90*
Oct 30	55	INT/DEFTS Rule 10j Statement
Oct 30	56	INT/DEFTS Supporting Afdidavit of Booth Gardner
Oct 30	57	INT/DEFTS Supporting Affdiavit of Robert J. Miller (unsigned)
Oct 30	58	INT/DEFTS Supporting Affdiavit of Carroll A. Campbell, Jr.
Oct 30	59	INT/DEFTS Memo of Law
Nov 13	60	INT/DEFTS Affidavit of Robert J. Miller
Nov 2		MOTION: Adj. to *12/7/90*
Nov 16	61	Supplemental Declaration of Stephen N. Salomon which corrects an error contained in the Declaration filed as Exhibit A to the Defts' Memo in Support of Cross-Motion for Summ/Judgment filed on 10/26/90
Nov 21	62	PLTF NYS's Reply Affidavit in Support of their Motion for Summ/Judgment and in Opposition to Int/Defts Cross-Motion for Summ/Judgment
Nov 21	63	PLTF NYS's Rule 10j Statement
Nov 21	64	PLTF NYS's Memo of Law
23	65	Plaintiff Allegany County's REPLY MEMO in Opposition to Motion to Dismiss & Cross Motion for Summary Judgment and in Support of State of New York's Motion for Summary Judgment
	66	Plaintiff Cortland County's Memo of Law in Opposition to Intervenors Motion to Dismiss
Dec 7		MINUTES: Govt's Motion to Dismiss is GRANTED, All other Motions are DENIED

7	67	ORDER: Deft/Govt's Motion to Dismiss is GRANTED, All claims against Defts are dismissed w/prejudice
Dec 26	68	Judgment (mailed copies & notice to litigants re: Time to appeal)
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Jan 9	69	Transcript of 12/7/90 motion decision by Judge Cholakis in Albany
Jan 23	70	Transcript of 12/7/90 motion held in Albany before Judge Cholakis
Jan 30	71	Notice of appeal by pltf County of Cortland, NY, from 12/26/90 judgment
Jan 30	72	Notice of appeal by pltf County of Allegany, NY, from 12/7/90 order and 12/26/90 judgment
Feb 1		Forwarded copies of Allegany County's notice of appeal and Cortland County's notice of appeal to all appearances
Jan 31	73	Notice of appeal by deft State of New York from 12/7/90 order and 12/26/90 judgment
Feb 1		Forwarded copies of NYS notice of appeal to all appearances
2/4/91		Copy of district court docket entries and notice of appeal on behalf of Appellant County of Cortland filed. [91-6031] Form C due on 2/9/91. Form D Due on 2/9/91. (unj) [91-6031]
2/4/91		Copy of district court docket entries and notice of appeal on behalf of Appellant County of Allegany in 91-6033 filed. [91-6033] Form C due on 2/9/91. Form D due on 2/9/91. (unj) [91-6033]
2/4/91		Copy of district court docket entries and notice of appeal on behalf of Appellant State

	of New York in 91-6035 filed. [91-6035] Form C due on 2/10/91. Form D due on 2/10/91. (unj) [91-6035]
2/6/91	Appellant County of Cortland Form C filed, with proof of service & attachments. [91-6031] Form C deadline sastisfied. (unj) [91-6031]
2/6/91	Appellant County of Cortland Form D filed, with proof of service & attachments. [91-6031] Form D deadline satisfied. (unj) [91-6031]
2/7/91	Appellant State of New York Form C filed, with proof of service & attachments. [91-6035] Form C deadline satisfied. (unj) [91-6035]
2/7/91	Appellant State of New York Form D filed. [91-6035] Form D deadline satisfied. (unj) [91-6035]
2/8/91	Appellant County of Allegany Form C filed, with proof of service & attachments. [91-6033] Form C deadline satisfied. (unj) [91-6033]
2/8/91	Appellant County of Allegany Form D filed. [91-6033] Form D deadline satisfied. (unj) [91-6033]
2/13/91	Scheduling order #1 filed. Record on appeal due on 3/8/91. Appellant's brief and appendix due on 3/15/91. Appellee's brief due on 4/15/91. Argument as early as week of 5/6/91. (Pre-Argument Conference scheduled for 2/21/91 @ 11:45 AM). (unj) [91-6031]
3/13/91	Joint Appendix received. Number of volumes: 1. Problem: awaiting appellant's brief. (onl) [91-6031]

3/14/91	Appellees USA, James D. Watkins, Kenneth M. Carr, NRC, Samuel K. Skinner, and Richard Thornburgh in 91-6031 motion for admission pro hac vice of: Jeffrey P. Kehne FILED (w/pfs). (onl) [91-6031]
3/14/91	Appellant County of Cortland in 91-6031 brief RECEIVED. Problem: awaiting record on appeal. (onl) [91-6031]
3/14/91	Notice of appearance form on behalf of Jeffrey P. Kehne, Edward J. Shawker, Esq., received. (Orig. to Calendar) Edited 3/25/91 in 91-6031, 33 and 35 [mc]. (unx) [91-6031]
3/15/91	Appellant County of Allegany in 91-6031 brief RECEIVED. Problem: awaiting record on appeal. (onl) [91-6031]
3/15/91	Notice of appearance form on behalf of Edward F. Premo, Esq., received. (Orig. to Calendar) (une) [91-6031]
3/18/91	Appellant State of New York in 91-6031 brief RECEIVED. Problem: awaiting record on appeal. (onl) [91-6031]
3/18/91	Order FILED GRANTING motion for admission pro hac vice of Jeffrey P. Kehne, Esq. by Appellee Richard Thornburgh, Samuel K. Skinner, NRC, Kenneth M. Carr, James D. Watkins, and USA, endorsed on motion form dated 3/14/91. (onl) [91-6031]
3/20/91	Notice of appearance form on behalf of John McConnell, Peter Schiff, Esq., received. (Orig. to Calendar) (une) [91-6031]
3/20/91	Record on appeal filed. (Original papers of district court.) (unv) [91-6031]
3/20/91	Record on appeal filed. (Original papers of district court.) (unv) [91-6031]

3/20/91	Appellant County of Cortland, New York in 91-6031 brief FILED with proof of service (ono) [91-6031]
3/20/91	Appellant County of Allegany, New York, in 91-6031 brief FILED with proof of service. (ono) [91-6031]
3/20/91	Appellant State of New York in 91-6031, County of Allegany in 91-6031, County of Cortland in 91-6031 joint appendix filed w/pfs. Number of volumes: one. (ono) [91-6031]
3/25/91	Letter, dated Mar. 21, 1991, by appellant STATE OF NEW YORK giving consent for filing of an amicus brief on behalf of The American College of Nuclear Physicians, Et Al. received (onl) [91-6031]
3/27/91	Letter, dated Mar. 27, 1991, by appellant COUNTY OF CORTLAND, giving consent to filing of amicus brief received (onl) [91-6031]
4/1/91	Letter dated Mar. 28, 1991, by appellee USA giving consent to filing of amicus brief by American college of Nuclear Physicians received (onl) [91-6031]
4/1/91	Letter dated Mar. 27, 1991, by amicus AMERICAN COLLEGE OF NUCLEAR PHYSICIANS confirming an amicus brief to be filed by appellee's due date received (onl) [91-6031]
4/1/91	Letter dated Mar. 27, 1991, by Intervenor-Appellee STATE OF SOUTH CAROLINA consenting to filing of amicus brief by Amer. College of Nuclear Physicians received (onl) [91-6031]
4/2/91	Letter dated Mar. 26, 1991, appellees the states of WASHINGTON and NEVADA,

	consenting to filing of amicus brief by Amer. College of Nuclear Physicians received (onl) [91-6031]
4/3/91	Letter dated Mar. 29, 1991, by appellant COUNTY OF ALLEGHENY, NY consenting to filing of amicus brief by Amer. College of Nuclear Physicians received (onl) [91-6031]
4/8/91	Proposed for argument the week of 5/20/91 in 91-6031, in 91-6033, in 91-6035. (cal) [91-6031 91-6033 91-6035]
4/11/91	Notice of appearance form on behalf of James Patrick Hudson, Esq., received. (Orig. to Calendar) (une) [91-6031]
4/11/91	Letter by appellee USA resubmitting consent to all parties of the filing of amicus brief received (onl) [91-6031]
4/16/91	Notice of appearance form on behalf of Allen T. Miller, Esq., received. (Orig. to Calendar) (une) [91-6031]
4/16/91	Appellees USA, James D. Watkins, Kenneth M. Carr, NRC, Samuel K. Skinner, and Richard Thornburgh in 91-6031 brief filed with proof of service Satisfy appellee's brief due. (onl) [91-6031]
4/16/91	Appellees State of Washington, State of Nevada and State of SC in 91-6031 brief filed with proof of service Satisfy appellee's brief due. (onl) [91-6031]
4/18/91	Set for argument on 5/21/91 at Uscthse (cac) [91-6031]
4/29/91	Appellant County of Cortland in 91-6031 reply brief filed with proof of service. (onl) [91-6031]

5/3/91	Appellant State of New York in 91-6031 reply brief filed with proof of service. (onl) [91-6031]
5/21/91	Case heard before MESKILL, PIERCE, MCLAUGHLIN, C.JJ (TAPE: 232+233) (car) [91-6031]
8/8/91	Judgment AFFIRMED by published signed opinion filed. (JMCL). (ona) [91-6031]
8/8/91	Judgment filed. (ona) [91-6031]
8/8/91	Judgment AFFIRMED by published signed opinion filed. (JMCL). (ona) [91-6033]
8/8/91	Judgment filed. (ona) [91-6033]
8/8/91	Judgment AFFIRMED by published signed opinion filed. (JMCL). (ona) [91-6035]
8/8/91	Judgment filed. (ona) [91-6035]
8/27/91	Appellee State of Washington, and State of Nevada itemized and verified bill of costs received. (ona) [91-6031]
8/29/91	Note: The OPINION PRICE is $3.60 (rek) [91-6031]
9/13/91	Appellee State of Washington, and State of Nevada statement of costs taxed in the amount of $61.85 filed. (ona) [91-6031]
9/17/91	Judgment MANDATE ISSUED. (une) [91-6031]
9/17/91	Judgment MANDATE ISSUED. (une) [91-6033]
9/17/91	Judgment MANDATE ISSUED. (une) [91-6035]
10/10/91	Notice of filing petition for writ of certiorari for Appellant County of Allegany in 91-6031 dated 10.3.91 filed. Supreme Ct#: 91-558. (ona) [91-6031]
10/15/91	Notice of filing petition for writ of certiorari for Appellant State of New York in 91-6031 dated 9.30.91 Supreme Ct#: 91-543. (ona) [91-6031]

Complaint (dated 2/12/90).

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

Plaintiffs, by their attorneys, for their complaint against the defendants, allege:

PRELIMINARY STATEMENT

1. This is a civil action by a State of the United States and by Counties of that State for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, declaring and adjudging that the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 U.S.C. §§ 2021b-2021i) (the "Act") is unconstitutional because it violates the Guaranty Clause of the United States Constitution, the Tenth and Eleventh Amendments thereto, the Due Process Clause, and constitutionally protected principles of federalism, and that, therefore, the Act should be declared null and void and of no force or effect.

PARTIES

2. Plaintiff, the State of New York ("New York"), is a State of the United States of America, which includes within its boundaries the geographic area covered by the United States District Court for the Northern District of New York.

3. Plaintiff, the County of Allegany ("Allegany County"), is a political subdivision of the State of New York, located within the geographic area covered by the United States District Court for the Western District of New York.

4. Plaintiff, the County of Cortland ("Cortland County"), is a political subdivision of the State of New York, located

within the geographic area covered by the United States District Court for the Northern District of New York.

5. Defendant, the United States of America, enacted the statute the constitutionality of which is the subject of this complaint.

6. Defendant, James D. Watkins, is the duly appointed and serving United States Secretary of Energy, and as such he is principally responsible for the administration of the Act.

7. Defendant, Kenneth M. Carr, is the duly appointed and serving Chairman of the United States Nuclear Regulatory Commission.

8. Defendant, the United States Nuclear Regulatory Commission ("NRC"), is a commission of the United States Government created pursuant to the Energy Reorganization Act of 1974 (42 U.S.C. §§ 5841-5851) and is a successor to the Atomic Energy Commission. It is responsible for administration of some aspects of the Act.

9. Defendant, Samuel K. Skinner, is the duly appointed and serving United States Secretary of Transportation, and as such he is responsible for the administration of United States laws governing the transportation of low-level radioactive waste.

10. Defendant, Richard Thornburgh, is the duly appointed and serving United States Attorney General, and as such he is responsible for litigation of actions to enforce the laws of the United States of America.

11. Defendants, Watkins, Carr, Skinner and Thornburgh, are each sued in their official capacities only.

JURISDICTION

12. The claim of Plaintiffs is founded upon, and jurisdiction of this action is maintained under, 28 U.S.C. §§ 1331, 1337 and 1346. A declaratory judgment and further relief are appropriate under 28 U.S.C. §§2201 and 2202.

VENUE

13. Venue of this action in the Northern District of New York is proper under 28 U.S.C. §§ 1391(e) and 1402.

BACKGROUND

14. The Act defines low-level radioactive waste ("LLRW") as radioactive material that: (a) is not "high-level" radioactive waste, spent nuclear fuel, or by-product material as defined at 42 USC § 2014(e)(2); and (b) the NRC classifies as LLRW. 42 USC § 202lb(9). Nationwide, about 90% of the volume and 97% of the radioactivity of LLRW, as so defined by the Act, comes from nuclear power plants and other industrial sources; the remainder comes from research laboratories, hospitals and medical centers.

15. In 1970, after the Atomic Energy Commission discontinued issuance of permits for ocean dumping of LLRW, shallow land burial became the exclusive legal method of disposal. In 1971, six commercial shallow land burial disposal facilities existed in the continental United States, including a LLRW disposal facility at West Valley, Cattaraugus County, New York. By 1978, safety problems and leakage of materials contaminated by LLRW led to the cessation of operation of three of these sites, including the facility at West Valley. New York is now engaged in a program, at substantial cost, to improve the West Valley LLRW disposal facility's capability to safely contain the LLRW already there.

16. At present, only three commercial LLRW disposal facilities are in operation in the United States, to wit: in Nevada, South Carolina and Washington.

17. The United States Congress enacted, on December 22, 1980, the Low-Level Radioactive Waste Policy Act (42 U.S.C. §§ 2021b-2021d) which provided that each State was responsible for the disposal of LLRW generated within its borders. It encouraged, but did not require, States to enter into compacts for the establishment of regional LLRW disposal facilities. It permitted each compact to restrict, after January 1, 1986, the use of its disposal facilities to LLRW generated within the geographic area covered by the compact.

18. Congress subsequently passed the Low-level Radioactive Waste Policy Amendments Act of 1985 ("the Act") (42 U.S.C.§§ 2021b-2021i). The Act sets forth a number of "milestones." They are outlined here.

19. Each State must by July 1, 1986 have joined a compact or certified its intent to site its disposal facilities for LLRW in-state. New York has certified its intent to so site and has not joined a compact. Congress may condition its approval of a compact on the member states' consent to the Act's limitations on state sovereignty. Since New York has not joined a compact, it has not consented, by any such joinder, to the limitations on State sovereignty set forth in the Act.

20. By January 1, 1988 each non-compact State must have prepared a siting plan, which New York has done. By January 1, 1990, each non-compact State must either apply for a license for its disposal facility or certify that it will be able to store, manage or dispose of its LLRW after January 1, 1993. New York provided a certification to the NRC on December 27, 1989. States choosing to so certify must apply for a license by January 1, 1992.

21. By January 1, 1993, if a State cannot dispose of its LLRW, any generators or owners of LLRW in that State may request the State to take title to and possession of LLRW generated, and to assume liability if it fails to do so. In the alternative, such a State must forego rebate to the State of portions of certain surcharges previously collected from the generators by sited States and instead such rebates would be paid to the generators. 42 U.S.C. § 2021e(d)(2)(C).

22. Each State must provide for disposal capacity by January 1, 1996. After that date, unsited States must accept possession of, title to, and liability for any LLRW offered by a generator within that state. After that date, the surcharge repayment alternative is not available. 42 U.S.C. § 2021e(d)(2)(C) states in pertinent part:

> If a State . . . in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State . . . by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996 as the generator or owner notifies the State that the waste is available for shipment.

23. The Act requires that States acquire disposal capacity for three classifications of LLRW. Class "A" wastes have levels of radioactivity that will diminish to the point where after 100 years an inadvertent intruder can safely come in contact with them. Class "B" wastes are more radioactive than Class "A" wastes and less radioactive than Class "C" wastes. Class "C" wastes must be disposed of in a facility that

is designed to protect against inadvertent intrusion for 500 years.

24. Class "A" waste was produced in the United States at the rate of about 1.8 million cubic feet per year in 1987 with annual radioactivity of about 26,000 curies. Class "B" waste was produced in the United States at the rate of about 39,000 cubic feet per year in 1987 with annual radioactivity of about 67,000 curies. Class "C" waste was produced in the United States at a rate of about 8,700 cubic feet per year in 1987 with annual radioactivity of about 180,000 curies. Class "C" waste makes up less than 1% by volume of all LLRW to be disposed of in the nation's facilities, yet it accounts for over 65% of the radioactivity. In other words, the most radioactive LLRW is produced in very small volumes.

25. The annual volume of LLRW shipped for disposal in commercial disposal facilities has dropped by about 55% since 1980 when the Low-Level Radioactive Waste Policy Act was enacted. That volume has dropped since 1985 when the Act was passed. LLRW volumes could drop by another 40 to 50% by 1993 if generators continue to increase their use of LLRW volume reduction techniques. Examples of such techniques include: sorting, decontamination, storage for decay, shredding, incineration and compaction.

26. States and compacts now plan to develop about a dozen LLRW disposal facilities as a consequence of the Act. However, because of technological developments since 1980 and 1985, it is probable that a far smaller number of facilities would accommodate the nations's LLRW.

27. Many disposal costs are fixed and do not vary with the volume of LLRW to be disposed by a LLRW disposal facility. Total disposal costs and unit disposal costs are likely to continue to rise significantly as the annual volume of LLRW falls

and the number of LLRW disposal facilities increases from the three facilities now operating to some higher number built because of the Act.

28. Because of the mandates imposed by the Act, New York was compelled to pass laws providing a structure to accomplish the Federal directive of developing a facility for the disposal of LLRW by January 1, 1996.

29. Under compulsion of the Act, New York enacted a State statute, Chapter 673 of the Laws of 1986. Chapter 673 sets forth a program under which New York: (1) by its Department of Environmental Conservation, would promulgate standards for selecting a disposal method and a site for a LLRW disposal facility; (2) by a Siting Commission, would select a disposal method and a site for a LLRW disposal facility; and (3) by the Energy Research and Development Authority, would build a LLRW disposal facility which would be operational by January 1, 1993. Enactment of a State statute in the nature of Chapter 673 was necessary in order to comply with the Act and to avoid the immediate sanctions for non-compliance with the Act.

30. New York has acted to comply with all three of the milestones of the Art which have already occurred. More specifically, in 1986, New York certified its intent to site its disposal facility for LLRW in-state, rather than elect to join a compact. In 1988, New York prepared a siting plan. In 1989, New York certified to the NRC that New York will be able to store, manage or dispose of its LLRW after January 1, 1993. The Siting Commission provided by Chapter 673 has already identified five potential disposal sites—three in Allegany County and two in Cortland County.

31. New York is proceeding with its site selection process and intends to go forward and continue to comply with the Act pending developments in this lawsuit.

32. The provision of the Act at 42 U.S.C. § 2021e(d)(2)(C) requiring New York to take title to and possession of, and liability for, all LLRW produced within New York (the "take-title" provision) imposes an unreasonable mandate upon New York that is extraordinarily burdensome, compels the expenditure of funds or the incursion of liability without New York's consent, is unprecedented in its intrusiveness, is not of general application to both the public and private sectors, and is preclusive of other options reasonably available to New York, such as requiring generators of LLRW to be liable for its disposal.

33. The Act effectively obligates New York to construct and operate a facility to dispose, not only of Class "A" and "B" wastes, but also of Class "C" wastes. This requirement is unreasonable because Class "C" wastes require special and costly precautions not applicable to Class "A" and "B" wastes, yet Class "C" wastes are produced in such low volume that a proliferation of disposal facilities around the nation for Class "C" wastes is not rational.

34. The need for annual LLRW disposal capacity has declined since Congress passed the Act in 1985 because annual LLRW volumes have declined and are likely to continue to decline. Whatever the national interest in overriding state sovereignty may have been in 1985, that interest is less compelling now.

35. New York has been and continues to be harmed and threatened with further immediate harm by the existence and purported validity of the Act. New York has been compelled to meet the milestones of the Act. Unless the Act is now declared unconstitutional, New York will be forced to continue to exercise its sovereign powers and to spend substantial public moneys before January 1, 1996 to meet the further milestones

of the Act and in order to avoid the risk of liability after January 1, 1996.

36. Allegany and Cortland Counties allege that they have been and continue to be significantly affected by the existence and purported validity of the Act. But for the Act, New York would not have identified as potential disposal sites the sites it has so identified in Allegany and Cortland Counties. Allegany and Cortland Counties allege that the construction or operation of a LLRW disposal facility would significantly affect the county in which such a facility is to be located and the citizens thereof. Allegany and Cortland Counties allege that the identification of potential disposal sites has already caused the counties to incur substantial expenditures for studies, public information, litigation and police services. The counties allege that the public identification of potential disposal sites has had, and will continue to have, significant adverse effects on the social and political fabric of each of the counties.

37. There is now existing between the parties hereto an actual controversy in respect to which Plaintiffs are entitled to have a declaration of their rights and further relief because of the facts, conditions and circumstances as set forth in this complaint.

CLAIM FOR RELIEF

38. Plaintiffs repeat and reallege each and every one of the allegations set forth in paragraphs 1 through 37, inclusive, with the same force and effect as if fully set forth at length herein.

39. The Act violates the Guaranty Clause of the United States Constitution, Article IV, section 4, by depriving the citizens of New York of the autonomy necessary to exercise

through their representatives a republican form of government.

40. The Act is an unprecedented infringement of New York's sovereignty because it compels New York, solely because it is a State, to employ its sovereign legislative and executive powers to fund, locate, design, build, regulate and maintain a LLRW disposal facility and, as necessary, to commence and resolve litigation in the Courts of New York in support of the implementation of a national policy dictated to New York by Congress.

41. The Act is an unconstitutional abridgement of New York's sovereignty because it effectively precludes New York from freely employing (if it were so to choose) the sovereign powers, which it would otherwise have available, to condition future generation of LLRW within its borders upon the availability of disposal capacity to be provided by the generator.

42. The take-title provision purports to regulate New York as a sovereign State, compels New York to act and to refrain from acting in matters which are indisputably attributes of State sovereignty, imposes strict, vicarious liability on New York, and impairs New York's ability to structure integral operations in areas of traditional governmental functions, all without any overriding federal interest of a nature which would justify New York's submission.

43. Moreover, extraordinary defects in the national political process render the Act invalid. The take-title provision was not originally proposed by any State or regularly reported out of any Congressional committee. Instead, it was a last minute creation added by Senate amendment to the House bill and accepted by the House of Representatives on the same day, the last day of the 1985 session. The States and their representatives in Congress could not effectively review or debate the

provision before voting on the Act. New York was deprived of the right to effectively participate in the national political process and it was left politically powerless to meaningfully participate. The passage of the Act itself undermined the principles of federalism on which the national political process depends. The national political process did not properly protect the sovereignty of all the States including New York.

44. The Act contains no severability clause and is not severable. Any constitutional portions of the Act are incapable of enforcement as Congress intended, without reference to the unconstitutional portions of the Act. Therefore, any constitutionally defective portion renders the entire Act invalid.

45. The Act is unconstitutional because it unlawfully intrudes on the sovereignty of New York in violation of the Tenth Amendment to the Constitution of the United States.

46. Pursuant to the take-title provision of the Act, the states which are without disposal capacity by January 1, 1996, must, among other things, be liable for all damages, directly or indirectly, incurred by a generator or owner as a consequence of the failure of the State to take possession of the LLRW.

47. The take-title provision of the Act purports to subject New York to vicarious, strict liability without fault by New York if it fails to comply with the milestones of the Act mandated in derogation of New York's sovereignty. The provision purports to make New York liable for damages arising from the claims of generators, owners or persons injured by LLRW, even though New York in effect has been deprived by federal law of the full range of powers which it would otherwise have to prohibit or regulate the generation or importation of LLRW.

48. New York has not consented to be sued for such damages, or to be vicariously liable for the acts of generators and owners of LLRW, in either state or federal courts.

49. The take-title provision of the Act purports to impose liability on New York solely because it is a sovereign state and not because it shares any characteristic of private proprietary generators or owners of LLRW.

50. New York retains its traditional sovereign immunity except for limited waivers of such immunity as specified by statute.

51. The take-title provision of the Act constitutes a coerced waiver of sovereign immunity and Eleventh Amendment immunity because it allows findings of liability against New York, with no such express waiver or uncoerced consent having been given by New York.

52. The Congress of the United States has not made clear its intent to abrogate the Eleventh Amendment immunity of the states by virtue of the Act, and in the absence of such clarity, there can be no abrogation of such Eleventh Amendment immunity.

53. Even if Congress had clearly intended to abrogate the Eleventh Amendment immunity of the states, the Act purports to impose liability on states, solely because they are states and not because of any act or negligent omission of any state, without imposing liability on generators or owners of LLRW.

54. As a result of the foregoing, the take-title provision of the Act violates the Eleventh Amendment to the Constitution of the United States, by purporting to impose liability without New York's consent, and therefore the Act should be declared null and void and of no force or effect.

55. Allegany and Cortland Counties allege that the Act, which is unconstitutional, has injured and will continue to injure them by reason of the substantial expenditures and disruptions caused by the public identification of potential disposal sites in each county. The counties allege that actual construction and operation of a LLRW disposal facility in either county would have significant additional adverse effects on that county.

56. Plaintiffs are entitled to a declaratory judgment declaring the Act unconstitutional, and further declaring that the entire Act is null and void and of no force or effect.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment on their claim for relief declaring that the Act is null and void and of no force or effect, together with such other and further relief as to the Court may seem just and equitable.

Dated: February 12, 1990

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Affidavit of Delores Cross in Opposition to Motion to Dismiss Complaint (dated 9/5/90).

STATE OF NEW YORK)
COUNTY OF ALLEGANY) SS:

DELORES CROSS, being duly sworn deposes and says:

1. I am the Chairman of the Board of Legislators of the County of Allegany, New York ("the County"). I submit this Affidavit in opposition to the motion of the Defendants United States of America, *et al.*, to dismiss the Complaint in the above referenced matter. This affidavit is also submitted in support of the motion for summary judgment of Plaintiff the State of New York.

2. As shown below, the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021b *et seq.* ("the Act") mandates that the governments of the State of New York and its political subdivisions become unwilling agents of the national government. The Act forces the States to be "responsible" for low-level radioactive waste generated within the State by either (a) developing a disposal facility either alone or in a compact with other states, (b) assuming title and possession of the waste, or (c) by being subject to liability for any failure to take title and possession. Therefore, the Act requires the State of New York, and its political subdivision, Allegany County, to exercise its sovereign powers to carry out a federal policy. This requirement violates the Guaranty Clause, Article IV Section 4, and the 10th and the 11th Amendments to the United States Constitution.

A. *The Act Violates the Constitutional Guarantee of a Republican Form of Government.*

3. As alleged in the Complaint in this action, New York State has been forced to enact legislation (29 E.C.L. §0101 *et seq.*), regulations (6 N.Y.C.R.R. Part 382) and to proceed with the proposed siting of a low-level radioactive waste disposal facility because of the sanction provisions of the Act. The law and regulations enacted by the State of New York provide for a commission to select a preferred disposal method and site for a low-level radioactive disposal facility to be located in New York State. The various agencies of the State of New York and its political subdivisions are required to "cooperate" in this process.

4. In September, 1989, the New York State Low-Level Radioactive Waste Disposal Siting Commission ("the Commission") designated three potential sites of approximately one square mile in size for a low-level radioactive waste disposal facility in the Allegany County Towns of Caneadea, West Almond and Allen. These three sites were selected from a candidate area previously identified by the Commission.

5. Immediately after a candidate area was identified in Allegany County, the Board of Legislators of Allegany County enacted on January 23, 1989, Resolution No. 45-89. This resolution protested the selection of the County and indicated the "irrevocable" opposition of Allegany County to the location of a disposal facility in the County. A copy of this resolution is annexed hereto as Exhibit A. On February 9, 1990, the Board of Legislators passed Resolution No. 63-90 authorizing the County to join as a plaintiff in this action to challenge the constitutionality of the Act. A copy of such resolution is annexed hereto as Exhibit B.

6. On various dates during late 1989 and the early part of 1990, the Commission attempted to gain access to the three sites in Allegany County to initiate so-called "precharacterization" studies. The Commission was prevented from entering such sites by citizens of Allegany County. Unfortunately, these confrontations have resulted in numerous court proceedings and the arrests of citizens of Allegany County. The last incident in April, 1990, lead to an episode between Troopers of the State of New York Police and citizens of the County who were on horseback. A newspaper article describing this confrontation is annexed hereto as Exhibit C.

7. The citizens of Allegany County by public comment to the Board of Legislators, town boards and by the actions of various citizens' groups have made clear that they oppose the possible location of a low-level radioactive waste disposal site in Allegany County. Various businesses and educational institutions have also expressed their opposition to such a facility in the County. The Board of Legislators and County officials have all agreed that such a disposal site would be deleterious to the County.

8. Nevertheless, the County has been forced by the terms of the Act and resulting actions by the State of New York to act as "agents" to carry out the policy of the Act.

9. For example, the Sheriff of Allegany County has been forced to serve civil process and to accompany members of the Commission Staff on various attempted visits to the potential sites. Allegany County facilities such as the County jail, County Courthouse and other buildings have been used for the purpose of holding citizens who have been charged with impeding the actions of the Commission. The Allegany County District Attorney and his staff have been forced to become involved in criminal prosecutions of citizens who allegedly illegally impeded the siting process. At various

times the State of New York has indicated that the County may have to invoke the "mutual aid" system for additional police protection. Once such "mutual aid" is requested, the County becomes financially liable for the service provided. Innumerable hours have been spent by officials of Allegany County in setting up procedures to attempt to avoid violence during the siting process.

10. All of these actions and expenditures of funds are the direct result of the Act, and the resulting State government reaction, and are against the wishes of the citizens of Allegany County. The various officials of Allegany County, against their will and the will of their constituents, have become agents of the federal government and forced to carry out the Congressional mandate with respect to low-level radioactive waste.

11. The Act has caused damage to the vital relationship between the people of Allegany County and their elected representatives. The compact between them has been broken. The United States Constitution, Article IV Section 4, guarantees to the States a Republican Form of Government—one in which the people control the government. However, the government of the State of New York and the government of Allegany County, with respect to the issue of low-level radioactive wastes, are no longer controlled by their citizens but by the federal government. The State and County governments have been forced and will be forced to exercise their sovereign powers, including police powers, eminent domain and taxing powers to execute a policy that our citizens vehemently oppose. Certainly, nothing could be more destructive of the "Republican Form of Government" than this.

B. *The Act has Jeopardized the Future of the County.*

12. The mere designation of the County as potential sites for low-level radioactive waste disposal facility have harmed the County financially. In order to respond to the work of the Commission and to insure the health and welfare of its citizens, the County has been forced to expend considerable funds for special legal and technical consultants. If the siting process continues, the County will be forced to expend funds for consultants to be involved in studies concerning disposal methods, the Commission's environmental impact statement, preparation for adjudicatory hearing on method selection, review of the siting process and resulting adjudicatory hearing and the provision of public information for the Allegany County community. As the process continues, the financial impact on the County will only increase. The County has approximately 50,000 residents and the financial impact on each of them for such activities is severe.

13. Moreover, individual County landowners have been harmed by the County being named as a potential site. Land values in the affected areas have dropped. Loans for further development of these properties and neighboring properties will be difficult, if not impossible, to obtain.

14. The citizens of the entire County, and, in particular, the citizens of the affected areas, have been subject to emotional stress and duress. Given the history of the nuclear industry in this country, this concern is understandable. The combination of operational practices, water infiltration and seepage through trench caps led to the closure of the West Valley, New York facility only 12 years after opening. The West Valley facility is located only fifteen miles away from the border of Allegany County. The Maxey Flats, Kentucky site also experienced an ingress of water which led to the migration of harmful radionuclides from the burial sites. Cleanup costs at various radio-

active waste disposal sites across the country have ranged from $7 million to billions of dollars.

15. Our citizens are not only concerned for their own welfare and the natural resources around them, but for their children's and grandchildren's future. The very real potential of debilitating cancerous diseases and genetic damage has frightened our citizens. This has led many people to pledge that they will do whatever is necessary to prevent the siting of a facility in Allegany County. Many County officials have grave concern for the potential of violence in our County.

16. The potential impact of the siting of a disposal facility on the County's industries would be severe. Agriculture is Allegany County's leading industry at this time. The three potential sites in the County include many acres of land which contain valuable soil groups and which have potential for active agricultural development. The County also relies heavily upon groundwater in the area for drinking water. All of the three sites in Allegany County are located within close proximity of potentially very productive aquifers of the Genesee River Valley. The Genesee River Valley could be a supply of potable water for the future growth of Allegany County if it is properly protected.

17. There are also untapped reserves of oil and gas that are located in the County. With the quickly rising price of petroleum products and the crisis in the Persian Gulf, these resources are becoming more competitive for development. Yet, the potential of a siting of a low-level radioactive waste disposal facility endangers such vital development. Oil and gas wells have been drilled throughout the County since the 1860s. Any leakage of radionuclides could quickly migrate and might contaminate oil and gas reserves rendering them useless. Certainly, no development of oil and gas reserves could take place at the site of a disposal facility.

18. The quality of life in Allegany County would be dramatically affected by the location of a low-level radioactive waste disposal site in the County. The stigma associated with such a site would certainly have severe consequences for area business, tourism and the day to day lifestyle. Already, the leaders of the Amish community located in Allegany County, which constitutes an important part of the agricultural community, have indicated that their community will move from the County if such a disposal facility is located here. Many other citizens have made the same statement to me. One can only imagine that with people unwilling to live in the County, businesses would soon leave because of the lack of employable workers and customers.

19. Even if the State were to decide not to build such a facility, Allegany County and its citizens would be affected by the Act. A decision by the State of New York not to build a disposal facility would result in the State of New York being liable for the low-level radioactive waste generated in the State. The resulting drain on the State treasury is incalculable and would certainly result in increased taxes for the citizens of Allegany County and a lack of funds from the State to Allegany County for needed programs.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this Court deny the Defendants' motion to dismiss the Complaint in the above referenced matter and grant the motion of the State of New York for summary judgment declaring the Act to be unconstitutional.

(Sworn to by DELORES CROSS, September 5, 1990.)

Exhibit A—Resolution No. 45-89.

TITLE: IRREVOCABLY OPPOSING THE SITING OF A LOW-LEVEL RADIOACTIVE WASTE DISPOSAL FACILITY IN ALLEGANY COUNTY; DEMANDING A THOROUGH RESEARCH AND INVESTIGATION BY STATE OF COUNTY ISSUES AND CONCERNS

Offered by: Planning and Historical Committee

WHEREAS, the Allegany County Board of Legislators, pursuant to Resolution No. 23-89, initially determined that the siting of a low-level radioactivity waste disposal facility would not be in the best interest of Allegany County, and

WHEREAS, the Planning and Historical Committee of the Board was directed to report to this Board appropriate proposals or positions in regard to the siting of a low-level radioactive waste disposal facility in Allegany County, and

WHEREAS, the Planning and Historical Committee has received both public and local government opinion as to the local impacts such siting would create if established in the County, and

WHEREAS, the Planning and Historical Committee has rendered its report to this Board, and

WHEREAS, from such report it appears that the State selected candidate area within Allegany County is not suitable for the siting of such facility due to the existence of principal aquifers in such area and the threat to them should facility failure occur, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility since such area has the highest rate of soil and streambank erosion in New York State and this poses a threat of damage to such facility, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the close proximity of Keaney Swamp and the potential threat to this resource should facility failure occur, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the close proximity of such area to the Clarendon-Linden Fault and to several geologic thrust faults under such area, which exacerbate the potential for facility failure if an earthquake occurs, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the existence of known, and the potential existence of yet unidentified, gas and oil wells, be they producing, non-producing or exploratory, within such area, that would provide pathways of migration for radionuclides should facility failure occur, and

WHEREAS, it further appears that the mineral resources, particularly oil and natural gas, within such area, are abundant based on levels of past exploration, and that the siting of such facility could eliminate the extraction of these resources, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the close proximity of such area to the Genesee River, a major ground water discharge zone, which serves as a source of potable water for residents north of such area along its entire course to Lake Ontario, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the great distance of such area from major low-level radioactive waste generators in

New York State, in that such distance creates an increased probability and threat of vehicular accident in the transporting of radioactive waste thereby heightening the danger to residential communities and compromising the public safety, and

WHEREAS, it further appears that the siting of such facility would result in a detrimental impact to the potential growth, both economic and social, of Allegany County that is expected to occur through implementation of the New York State sponsored Ceramic Corridor Program at and in the vicinity of Alfred, New York, and

WHEREAS, it is the opinion of the Planning and Historical Committee that the New York State Low-Level Radioactive Waste Siting Commission Document entitled "Candidate Area Identification Report" data utilized and applied in selecting such area that is stale and of questionable accuracy, now, therefore, be it

RESOLVED:

1. That this Board of Legislators of the County of Allegany irrevocably opposes the siting of a low-level radioactive waste disposal facility in Allegany County.

2. That demand is hereby made that the New York State Low-Level Radioactive Waste Siting Commission and the New York State Department of Environmental Conservation thoroughly research and investigate the social, economic and environmental issues and concerns set forth in this resolution in the event the Allegany County candidate area remains a potential siting for such facility.

I, Linda J. Canfield, Clerk of the Board of Legislators of the County of Allegany, State of New York do hereby certify that the foregoing constitutes a correct copy of the original on file

in my office and the whole thereof of a resolution passed by said Board on the 23rd day of January, 1989.

Dated at Belmont, New York this 23rd day of August, 1990.

Linda J. Canfield
Clerk, Board of Legislators
Allegany County

Moved by Cross Seconded by Sylor VOTE: Ayes 15 Noes 0 Absent 0

Exhibit B—Resolution No. 63-90.

TITLE: A RESOLUTION TO JOIN AS A PLAINTIFF WITH THE STATE OF NEW YORK AND CORTLAND COUNTY IN AN ACTION TO DECLARE THE FEDERAL LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OF 1985 UNCONSTITUTIONAL; AUTHORIZING COUNTY ATTORNEY AND SPECIAL COUNSEL TO ACT AS COUNSEL; PROVIDING THAT COUNTY PARTICIPATION IN SUCH ACTION SHALL BE WITHOUT PREJUDICE TO CERTAIN ENUMERATED POSITIONS OF THE COUNTY; REQUESTING STATE OF NEW YORK TO CEASE SITING PROCESS AND TO BRING A PRELIMINARY INJUNCTION MOTION TO STAY ENFORCEMENT OF SUCH ACT.

Offered by: Ways and Means Committee

WHEREAS, on or about January 15, 1986, the Congress of the United States passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("the Act") which provided that each State was responsible for the disposal of low-level radioactive waste ("LLRW") generated within its border, and

WHEREAS, the Act provided that each State not participating in an interstate compact for the disposal of LLRW generated with the State, and

WHEREAS, any State that fails to prepare such a disposal plan and to implement such plan on certain milestone dates is subject to the loss of certain funds collected by the federal government, barred from shipping LLRW to interim disposal facilities and required to take either title and possession of the LLRW generated or to assume liability for such LLRW, and

WHEREAS, the State of New York, because of the coercive provisions of the Act, enacted into law Environmental Conservation Law § 29-0101 *et seq.* which established a siting commission to select a disposal method and a site for a LLRW disposal facility, and

WHEREAS, in September, 1989, the siting commission selected three potential sites in Allegany County and two in Cortland County for the siting of such disposal facility, and

WHEREAS, the Board of Legislators of Allegany County and various citizens groups have protested the methodology and conclusions of the siting commission, and

WHEREAS, the Board of Legislators of Allegany County and various of its citizens have protested to the Governor of the State of New York the State's actions and have raised the issue of the constitutionality of the Act, and

WHEREAS, the Governor of the State of New York, Mario Cuomo, instructed the Attorney General of the State of New York, Robert Abrams to commence an action to challenge the constitutionality of the Act, and

WHEREAS, in January of 1990 the Attorney General's Office contacted special counsel for Allegany County, Harter, Secrest & Emery, and requested that Allegany County and Cortland County join as plaintiffs with the State of New York in the federal court action challenging the constitutionality of the Act, and

WHEREAS, Cortland County has decided to join in such action, and

WHEREAS, special counsel for Allegany County, Harter, Secrest & Emery has recommended that the County join in such action, now, therefore, be it

RESOLVED:

1. That the County of Allegany join as a plaintiff with the State of New York and the County of Cortland in an action seeking to declare the Act unconstitutional.

2. That the County Attorney, James T. Sikaras, and Special Counsel, Harter, Secrest & Emery, are authorized to act as counsel for the County of Allegany in such action.

3. That the County Attorney and Special Counsel inform the State of New York that participation of the County of Allegany in this action is without prejudice to the County's position that (1) the siting process should be stopped; (2) that the siting commission's methodology and conclusions have been flawed; and (3) that the low-level radioactive waste disposal facility should not be located in Allegany County.

4. That the County Attorney and Special Counsel are directed to request the State of New York to immediately cease the siting process and to request the State of New York to bring a preliminary injunction motion staying the enforcement of the Act.

PREPARED BY COUNTY ATTORNEY PER FEBRUARY 8, 1990 ORDER OF BOARD CHAIRMAN.

I, Linda J. Canfield, Clerk of the Board of Legislators of the County of Allegany, State of New York do hereby certify that the foregoing constitutes a correct copy of the original on file

in my office and the whole thereof of a resolution passed by said Board on the 9th day of February, 1990.

LINDA J. CANFIELD
Clerk, Board of Legislators, Allegany County

Dated at Belmont, New York this 9th day of February, 1990.

Moved by Sylor Seconded by Watson VOTE: Ayes 15 Noes 0 Absent 0

Exhibit C—Newspaper Article.

Allegany County

TWO INJURED IN PROTEST AT SITE, 49 ARE ARRESTED

By JOHN T. EBERTH
and MARK WHITEHOUSE
Times Herald Staff Writers

CANEADEA — Two people — a state trooper and a protester — were injured Thursday in a clash between protesters and police as the state's radioactive waste siting commission tried to get onto the proposed nuclear disposal site in Caneadea.

Thirty-nine people were arrested, two on felony charges and the others on charges of disorderly conduct. Disorderly conduct constitutes a violation.

State police, the county sheriff, and a three-man team from the siting commission had gotten past several barriers and were heading toward the site on foot when nine masked protesters on horses came toward them.

A horse stepped on the foot of State Police Sgt. Samuel Taglienti, who is based in Boston, N.Y. He was treated and released at Jones Memorial Hospital for the injury. It is still unknown how serious the injury is, although Troop A Commander Lt. Charles McCole said Sgt. Taglienti's foot was not broken.

Also injured was Karl J. Root, 28, of Bolivar, who was reportedly riding the horse that stepped on the sergeant's foot.

He was taken into custody, then treated at Jones Memorial Hospital for bruises and abrasions on one hand and "soft tissue injuries" on the other hand, said his lawyer, Patricia Fogarty.

ROOT WAS charged with second degree assault, a class C felony; attempted second degree assault, a class D felony, and resisting arrest.

Another of the riders, Donald W. Middaugh, 23, of Friendship, was charged with second degree attempted assault and resisting arrest. He was reportedly not hurt.

Protesters were shouting "Police brutality" and "Way to go, New York's finest!" as the two horsemen were escorted away.

The siting commission did not reach the Caneadea site. Lt. McCole called off the attempted walkover after the incident with the horses, saying he couldn't justify risking further violence.

County Sheriff Larry Scholes said the siting commission reported no plans to return for another walkover attempt. "They plan to leave this in (Supreme Court Justice Jerome Gorski's) hands," he said. "They're going to try the injunction route."

The commission has an injunction barring anyone from interfering with its attempts to get on the three potential Allegany County dump sites; violators are subject to a maximum $1,000 fine and 30 day's imprisonment.

BOTH MIDDAUGH and Root were taken to Wellsville state police headquarters for processing. They were later arraigned before Willing town justice Richard Tompkins, who released both men on their own recognizance. They are scheduled to return to court at 8 p.m. April 25, although the case may be transferred to another court before that, Ms. Fogarty said. She said she is not sure who will ultimately represent the two men. She and three other attorneys have volunteered to work with Alfred attorney Jerry Fowler to represent protesters. The nine horses bearing masked riders met the police on East Hill Road at 1:45 p.m.

The lead horse, driven at a gallop, nearly ran into the line of police. One trooper in front had to veer away to avoid being hit

by the horse. The other horses were then turned sideways and walked in front of the troopers to stop their advance.

At that point, several troopers drew their night sticks and attempted to continue their advance.

POLICE TOOK the reins of one horse and attempted to arrest its masked rider. But the rider refused to dismount, nearly toppling the horse as troopers attempted to pull him off it.

Several troopers attempted to separate the man from his mount, but the reins were wrapped around his hands. One trooper used the short end of his baton to rap the man's hands free. He was then dragged to the ground and handcuffed.

At 1:52 p.m. two of the horsemen had been arrested and Lt. McCole called off the advance.

"I think we used what necessary force was needed to complete the arrest," said State Police Lt. Charles McCole after the incident.

Afterward, Lt. McCole said he was confident his troopers could have gotten the commission onto the site, but said he called off the advance to avoid further violence.

"An incident took place that I thought could have resulted in a short-term riot," he said. "At that time we decided to disengage."

LT. McCOLE SAID he felt "one of the horses brush up against me," and that he was concerned for everyone's safety when the horses blocked the road.

He called the uses of the horses to block the troopers "an unnecessary and dangerous act."

"Masked men on horses — it's like something out of the wild west," he added.

Several protesters said state police may have violated the civil rights of those arrested and may have used unnecessary violence.

"If someone wants to file a complaint and they don't feel comfortable talking to me, there is a troop commander in Batavia they can talk to," Lt. McCole told them.

"As to the conduct of my troopers, I'm extremely proud of them," he said. "If you believe there has been a violation of anybody's civil rights, the FBI is the agency that would handle the complaint," Lt. McCole added.

Bruce Goodale, director of the site-selection process, witnessed the fracas but hinted the violence won't dissuade him from attempting to conduct a site walkover at Caneadea in the future.

"Today is today and tomorrow we have to make our plans based on what we learned today," he said. "Obviously we're not getting on the site today so we'll have to quit." On Thursday, Sheriff Scholes said he supported Lt. McCole's decision to pull out of Caneadea. "It was a dangerous situation," the sheriff said. "It was dangerous from the word 'go,' not because of the troopers."

He said introducing horses into the situation was an unwise decision.

Affidavit of Cindy M. Monaco in Opposition to Motion to Dismiss Complaint (dated 9/5/90).

Cindy M. Monaco, being duly sworn, deposes and says:

1. I am the Cortland County Low-Level Radioactive Waste (LLRW) Coordinator. My office is located in Room 204, County Office Building, 60 Central Avenue, P.O. Box 5590, Cortland, New York 13045.

2. I have been employed in this position since 3 February 1989. My responsibilities as the coordinator on the LLRW issue include research regarding the generation and management of LLRW and the education of the public on such matters.

GENERATION OF LLRW

3. LLRW is commercially generated from a variety of sources, which include the generation of electricity by the utilities, industrial research and manufacturing processes, diagnostic and medical services, and government research. (DOE/LLW-69T)

4. In reporting information concerning LLRW production, commercial generators provide figures regarding both volume and radioactivity. In terms of judging the biological hazard associated with the waste, it is the amount of radioactivity which is the significant factor.

5. Since 1983, in reporting information regarding volume and radioactivity of LLRW produced in the nation, five (5) categories were established which indicate the source of commercially generated LLRW. These categories consist of utility, industrial, medical, academic, and government waste.

6. Although the relative contributions to the waste stream from each of the generators and the total amounts of waste produced may vary drastically from year to year, nuclear power generation accounts for the majority of the volume and radioactivity of the nation's commercially generated LLRW.

RELATIVE CONTRIBUTIONS TO THE WASTE STREAM

7. The *1987 State-by-State Assessment of Low-Level Radioactive Waste Received at Commercial Disposal Sites* (DOE/LLW-69T, Tyron-Hopko and Ozaki, 1988) shows that, in 1987, utility, industrial, government, academic, and medical waste accounted for 51.0%, 39.1%, 7.1%, 1.6%, and 1.2%, respectively, of the volume of commercially generated LLRW in the United States. The radioactivity, which is the pertinent statistic regarding biological hazard, is reported as follows: utility.- 81.6%; industrial - 15.6%; government - 2.6%. The radioactivity due to medical and academic sources was negligible.

8. According to the New York State LLRW Siting Commission's *Executive Summary—Source Term Report: Low-Level Radioactive Waste Projection for New York* (July 1989), 98% of the total radioactivity to be deposited in a 60-year New York State facility will be due to utility waste. Nuclear power generation is expected to account for 70% of the total volume to be deposited in the proposed New York State facility. (These figures include decommissioning and dismantling of two nuclear power reactors.)

9. Since the preparation of the Siting Commission's *Source Term Report*, Cintichem, Inc., an industrial generator of radiopharmaceuticals, has ceased production. This results in revised estimates concerning the relative contribution of New York State's generators to the waste stream. With the elimination of

Cintichem's waste stream, nuclear power plant waste is expected to account for more than 99% of the total radioactivity to be deposited in the 60-year New York State facility.

10. According to the Siting Commission's estimates, medical and academic waste is expected to account for less than 0.2% of the total radioactivity in the proposed New York State facility.

CLASSIFICATION OF LLRW

11. In accordance with United States Nuclear Regulatory Commission (NRC) regulations, the low-level waste stream is divided into three (3) categories: Class A, Class B, and Class C. As per NRC regulations, Class A, B and C wastes would require isolation from the environment for 100, 300, and 500 years, respectively.

12. The classification scheme for LLRW is determined solely by the federal government, specifically the NRC in 10 CFR Part 61. Classification into the A, B, and C categories depends on an interplay between isotope concentration and half-life (the amount of time it takes for half of the mass of a radioactive substance to decay). "In general, 'Class A' wastes contain either very low concentrations of radioactive materials with long half-lives, or relatively low concentrations of radioactive materials with short half-lives; 'Class C' wastes can contain moderate concentrations of long-lived radioactive materials, or high concentrations of radioactive materials with short half-lives. 'Class B' wastes are intermediate in their content of long- and short-lived radioactive materials." (New York State Department of Health, *General Information on Low-Level Radioactive Waste Disposal in New York State*). Some examples of isotopes found in LLRW and their associated half-lives include:

Iodine-129 (16 Million Years); Thorium-232 (14 Billion Years); Uranium-235 (704 Million Years); Uranium-238 (4.7 Billion Years); Cobalt-60 (5.27 Years); Tritium (12.3 Years). (Figures are from NYSERDA, *1988 NYS LLRW Status Report*, June 1989). In determining waste classifications, the NRC regulations do allow for concentration averaging and, hence, dilution of the waste forms.

13. In general, a radioactive substance which has undergone ten to twenty decay periods (half-lives) is deemed to have reached background levels in terms of its radioactivity content. While the NRC has specified isolation periods of 100, 300, and 500 years for Class A, B, and C wastes, respectively, this does not mean the emissions from those materials have reached background levels. Clearly, given the long half-lives of a number of the isotopes found in LLRW, the radiological component of a variety of low-level wastes will persist in the environment for periods well beyond the time intervals prescribed by the NRC.

14. A subset of the low-level waste stream which is proving to be extremely problematic is "mixed waste". Mixed waste is waste that is classified as both radioactive waste and hazardous. It is dually regulated by the NRC and the United States Environmental Protection Agency (EPA) for its radiological and hazardous components, respectively. In its November 1989 report, *Partnerships Under Pressure*, the office of Technology Assessment (OTA) reported:

> Some specific regulations cannot be met, some regulations may be in conflict and inconsistent, and other regulations overlap and are duplicative. Although mixed LLW (low-level waste) comprises less than 10 percent of all LLW, it has been identified by States as their major concern in managing LLW. No disposal facility for mixed LLW has been available since 1985.

> Also, no offsite storage or treatment facility is available. Since mixed LLW is a subset of LLW, States will have to be able to manage their mixed LLW if they are to meet the milestones of the LLRWPAA."

Current disposal figures do not include mixed waste volumes since no disposal sites exist which accept these materials. According to the OTA, "It is estimated that mixed LLW would increase the national volume of nonmixed LLW by 3 to 10 percent."

15. Typically, Class A material, the least hazardous constituent of the waste stream, comprises the largest percentage of the total volume of waste produced; yet, Class A waste accounts for a very small portion of the total radioactivity. In sharp contrast, Class C waste generally accounts for a minor percentage of the total LLRW volume, but comprises the vast majority of the radioactivity.

16. The Siting Commission's *Source Term Report* (July 1989) projects that, in a 60-year New York State facility, Class C waste will account for 93.6% of the total radioactivity of the waste stream. (Class A and B materials will account for 3.1% and 3.3%, respectively, of the total radioactivity.)

WASTE GENERATION & MANAGEMENT: CLASS A vs. CLASS C

17. With the exception of sealed sources, in both New York State and the rest of the nation, LLRW produced by medical and academic institutions is Class A waste. The New York State Energy Research & Development Authority's (NYSERDA's) *1987 Low-Level Radioactive Waste Status Report* shows that, in New York State in 1987, only 60 cubic feet (0.3 curies) of Class C waste was due to medical and academic sources. The remaining 24,152 cubic feet of medical

and academic waste was Class A material. In New York State in 1988, all 16,522 cubic feet of medical and academic waste was Class A (NYSERDA, 1989). On a national level in 1987, medical and academic generators shipped 72 cubic feet, and less than 2 curies, of Class C waste for disposal.

18. According to NYSERDA (June 1989), in New York State nuclear power reactors were solely responsible for the generation and disposal of 12,800 curies of Class C waste in 1988. In addition, the vast majority of Class C waste which is expected to be disposed in the proposed New York State facility will be due to nuclear power generation and will include irradiated reactor components, resins, filters, and sludges. On a national level, utility waste accounted for the shipping of 7,485 cubic feet and 175,023 curies of Class C waste. In 1987, utility generators accounted for more than 99% of the total radioactivity of the Class C waste that was shipped for disposal in the nation (Tyron-Hopko & Ozaki, December 1988).

19. According to *The 1987 State-by-State Assessment of Low-Level Radioactive Wastes Received at Commercial Disposal Sites* (Tyron-Hopko & Ozaki, December 1988), Class C waste accounted for only 0.5% of the nation's total volume of commercially generated LLRW that was shipped for disposal. Elimination of the requirement for state responsibility of Class C waste will not create an "orphan" waste for which management capabilities will not exist. The volume of Class C waste represents an insignificant percentage of the total volume of LLRW generated in the U.S. If a federal high-level radioactive waste (HLRW) repository is developed, the addition of Class C LLRW should pose no technical or health and safety difficulties. In the likely event that development of a HLRW repository is delayed, Class C waste could be temporarily stored at the reactor site with the spent fuel. Given the small volume of Class C waste and its activity, which is no greater

than HLRW, this alternative should result in no unresolved technical or safety issues.

20. Management requirements (waste form, packaging, institutional control period, level of shielding) for Class A waste differ greatly from those for Class B and C materials. Thus, the provisions required for the safe management of virtually all medical and academic waste are very much different from those needed to effectively manage utility waste.

TRENDS IN WASTE GENERATION

21. The passage of the LLRW Policy Act of 1980 was due, in part, to the increasing volumes of waste which were being produced at the time (GAO/RCED-83-480). A 1983 General Accounting Office (GAO) report indicates that the Department of Energy (DOE), in 1980, projected that a total of five (5) to seven (7) disposal sites would be needed nationwide by 1990 in order to dispose of the country's commercially generated waste. This was prior to the advent of waste reduction techniques (such as supercompaction, incineration, and decontamination) which have drastically decreased the volume of LLRW generated nationally. In 1980 the nation generated 3.77 million cubic feet of commercial LLRW. By 1988, the U.S. generated 1.43 million cubic feet of commercial LLRW, which represents a national decrease of 62%. Thus, the DOE projections severely overestimate the number of disposal sites necessary to accommodate the nation's LLRW.

22. In *Partnerships Under Pressure* (November 1989), the OTA reported that, by 1993, waste volumes could decline another 50% from 1988 figures. The OTA cautions that volume is a major determinant of unit disposal cost. Smaller volumes will mean higher per unit disposal fees because of the fixed nature of many of the development and maintenance costs associated with LLRW disposal sites. With the nation's

shift to a dozen or more facilities, unit disposal costs are expected to rise dramatically. It is unclear if medical and academic generators will be able to afford to use the new facilities.

ECONOMIC VIABILITY

23. It has been estimated that 300,000 to 400,000 cubic feet of LLRW is required to make one disposal facility economically feasible. In several of the existing compacts and in the case of New York State, projected volumes fall well below those limits. New York State is expected to produce an average of approximately 100,000 cubic feet per year over a 60 year period.

24. In addition, in New York State, there is nothing to preclude generators from shipping waste out-of-state for disposal in the event that an out-of-state facility is amenable to accepting such waste. This further jeopardizes the economic viability of the disposal site.

25. Finally, the NRC recently released a policy statement concerning exemptions of certain portions of the low-level waste stream from regulatory control. According to the Nuclear Information and Resource Service, such a policy, if adopted into regulation, would eliminate approximately 30 percent of the volume of waste which is currently classified as LLRW. This additional decrease in waste volume would further jeopardize the economic viability of many of the planned disposal facilities.

DISPOSAL FEES

26. The Michigan Department of Management and Budget (Detroit Free Press, 16 March 1989) estimated the cost of developing a single disposal facility at $300 million. It further

estimated the unit disposal fees at the proposed Michigan facility to be in excess of $300 per cubic foot. (By comparison, as of February 1990, the estimated cost of disposal at the proposed California facility was $140 per cubic foot.)

27. A 6 June 1988 report from Washington State Senator Williams to Phil Moeller, Lead Analyst of the Energy & Utilities Committee, examines the implications which are likely to result from the Hanford facility becoming an in-region only site. The basic disposal fee is anticipated to more than double once the site restricts itself to accepting waste from only its compact members.

28. The OTA estimates that, depending on waste volume and disposal technology, per cubic foot disposal fees for non-mixed LLRW could vary from $50 to $590.

29. According to reports presented at the 12th Annual DOE LLW Management Conference, the cost of mixed waste disposal is anticipated to be approximately $15,000 per cubic foot. Moreover, the need to accommodate mixed waste is expected to add a cost of several million dollars to the development of each of the LLRW disposal facilities which is currently planned. The federal government, specifically the DOE, accounts for approximately 97 to 99 percent of the mixed waste that is produced nationally. Commercial generation of mixed waste (civilian and government) accounts for a mere 1 to 3 percent. (Figures were provided by Dr. John Randall, NYS LLRW Siting Commission.)

30. Even in cases where states have entered into compacts, the economic viability of disposal facilities is questionable. This was clearly illustrated by Chem Nuclear's decision not to bid on the construction and operation of a disposal facility for the Central States Compact. Chem Nuclear believed that the projected waste stream was too small to allow the operation to

be economically viable (C. Bullard & H. Weger, LLRW disposal: Economies of scale and half-life segregation, Proceedings from Waste Management 1990, Tuscon, Arizona). In 1987, the Central States Compact shipped 152,224 cubic feet of LLRW for disposal (Tyron-Hopko & Ozaki, December 1988).

31. According to C.W. Bullard & H.T. Weger (LLRW disposal: Economies of scale and half-life segregation, Proceedings from Waste Management 1990, Tuscon, Arizona), a report by the Electric Power Research Institute demonstrates that, if only four (4) new disposal sites were developed in the nation, a $2.8 billion savings in operational and capital costs could be achieved.

ON-SITE STORAGE

32. The need for long-term on-site storage is apparent if one examines the status of siting activities in virtually all of the states and compacts. For example, Texas is involved in litigation which is expected to delay the process by at least two years. According to Chem Nuclear officials, the development of the North Carolina facility, to be used by the Southeast Compact, is experiencing a 21 month delay. The siting process in Nebraska, host state of the Central Interstate Compact, has experienced fierce public opposition. In Illinois the entire process is being independently reviewed. In New York State, recently enacted legislation has drastically altered the nature of the siting process and is expected to require more time for method and site selection and review of work done to date. With regard to the issue of mixed waste disposal, none of the states or compacts has made significant progress, and at this point it seems unlikely that any state or compact will be capable of disposing of all its LLRW by the January 1, 1996 deadline.

33. For the majority of states, including New York, interim management provisions involve on-site storage at the point of generation, and, in most instances, effective LLRW management in states and compacts will *require* longer term on-site storage than was originally anticipated. For most of the power plants, five (5) year storage capacity already exists. This capacity could be increased by the utilities' applying to the NRC for a license amendment.

34. The majority of medical and academic wastes contains short-lived isotopes in low concentrations. This portion of the low-level waste stream can be (and often is) stored on-site for decay. The material, after going through a sufficient number of half-lives, can then be disposed in a regular landfill. No comprehensive data set currently exists which objectively evaluates the ability of LLRW generators to store waste on-site for decay.

35. In late May 1990, the NRC, without the benefit of public input, issued a policy statement which indicates that, as of 1996, the NRC will not "look favorably" on point-of-generation storage at reactor sites. See Exhibit A (attached hereto). The memo contains no discussion of the technical justification for this policy, nor does it define any pertinent health or safety issues which may have affected its decision making.

36. The LLRW Policy Act of 1980 (LLRWPA) and the LLRW Policy Amendments Act of 1985 (LLRWPAA) severely limit the scope of waste management options available to the states. For example, no comprehensive study of point of generation storage or disposal (including an evaluation of regulatory, technical, and economic concerns) has ever been implemented. Thus, the existing generator storage capacity and the ability of generators to expand storage capacity is unknown.

37. The economics associated with on-site storage/disposal versus centralized disposal has not been investigated. In evaluating the costs associated with on-site management, the economic situation would undoubtedly differ depending on the generator classification. For example, management requirements for medical and academic waste, virtually all of which is Class A, are far less stringent than those necessary for Class B and C utility waste. These differences would be reflected in costs incurred for facility development.

38. As already indicated, the majority of New York State's nuclear power plants have existing on-site storage capacity for a five (5) year period, and, from a regulatory perspective, extension of storage capacity beyond that limit would require an amendment to the reactor's operating license. The ability of the utilities to extend on-site capacity beyond the five (5) year limit requires objective investigation from the technical perspective.

39. Currently, HLRW, which is much higher in radioactivity than LLRW, is being stored at the reactor sites in pools or in monitored retrievable storage facilities. Given the absence of progress in developing a federal HLRW repository, it is likely that HLRW will remain on-site at the reactors for the next several decades. In fact, the NRC recently published a revision to its 1984 Waste Confidence Decision in which it evaluated the issue of safe storage or disposal of commercially generated radioactive waste. The NRC found that "spent fuel generated in any reactor can be stored safely and without significant environmental impact for at least thirty years beyond the licensed life (of the power plant) at the reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations." (1990 Annual Report Section of Public Utility Law, American Bar Association, p.93) The curie content of utility generated LLRW is negligible when compared with that of HLRW.

40. On-site storage, particularly for utility waste is a management alternative which deserves serious consideration in light of the questionable economics and technical aspects of the LLRW policy that is being forced upon the nation by the LLRWPA and LLRWPAA. There appear to be no significant technical limitations to extended on-site storage of LLRW at reactor sites.

41. At the 12th Annual DOE LLW Management Conference which I attended in Chicago on August, 28 and 29, 1990, Mr. Terry Lash, formerly with the Illinois Department of Nuclear Safety, stated that all types of low-level waste can be stored safely at nuclear power plants if sufficient funds are allocated. The question, he stated, is not if it can be done but rather whether we want to go in that direction.

42. At the abovementioned DOE conference, Hans Tammemagi of Acres International reported that Ontario Hydro, Canada's largest nuclear utility, has been storing all of its LLRW on-site for the past 17 years, and on-site storage of LLRW is planned for a total of 50 years. Mr. Tammemagi stated that there have been no technical problems resulting from the almost 2 decades of on-site storage at the reactor complex, nor are any difficulties anticipated. Moreover, Mr. Tammemagi stated that on-site storage will need to be an integral part of any realistic LLRW management plan in the United States. He further recommended that the NRC recognize this need and alter its policy against long-term on-site storage at reactor sites after January 1, 1996.

SITE-SPECIFIC ENVIRONMENTAL CONSIDERATIONS

43. The 1980 LLRW Policy Act, although it encourages regional compacts, creates the climate for the proliferation of many disposal sites throughout the nation. Prior to enacting this legislation, a comprehensive review of region-specific

environmental considerations and an economic feasibility assessment were not implemented.

44. The literature supports the assertion that climate is the single most important factor in establishing technically sound LLRW disposal-sites. In a 1990 U.S. Geologic Survey (USGS) report (*Geohydrologic Aspects for Siting and Design of Low-Level Radioactive-Waste Disposal*, M.S. Badinger, USGS Circular 1034) it states:

> Climate directly affects the hydrology of a site and probably is the most important single factor that affects the suitability of a site for shallow-land burial of low-level radioactive waste. Humid and subhumid regions are not well suited for shallow isolation of low-level radioactive waste in the saturated zone; arid regions with zero to small infiltration from precipitation, great depths to the water table, and long flow paths to natural discharge areas are naturally well suited to isolation of the waste. (emphasis omitted)

Thus, the LLRWPA and LLRWPAA have their most devastating effect and inflict the most hardship on those states located in areas of high precipitation, shallow water table depth, and high yield aquifers, such as in the northeast.

45. Water infiltration was the major factor which led to the closure of the disposal sites at Maxey-Flats, Kentucky and West Valley, New York. The wet climate and high water table of New York and other northeastern states clearly complicate construction of a disposal site. It is highly unlikely that a facility in the northeast could ever maintain its integrity and, thus, be as "safe" as one built in an arid climate. The degree of safety that could be achieved by a New York State facility may not be adequate to protect public health to the best of the nation's ability.

FEDERAL AUTHORITY vs. STATE RESPONSIBILITY

46. The federal government maintains complete jurisdiction over the majority of nuclear issues, including LLRW management. The definition of LLRW, certain performance standards, waste production and storage at nuclear power plants and Part 70 facilities, and allowable exposure standards are all federally controlled. Yet, the responsibility for LLRW management was delegated to the states. The NRC is attempting to "tie the hands" of the states that are functioning within the confines of the federal LLRW legislation and trying to meet its intent.

47. The NRC continually attempts to thwart the ability of a state to protect the health and welfare of its citizens and the integrity of its environment. As indicated above, the NRC has promulgated a policy against long-term on-site storage at reactor sites, regardless of the fact that this position is technically unsupported and that this management option has worked successfully in Canada.

48. In addition, the federal government is placing undue restrictions on the states through the NRC's proposed policy concerning exemptions from regulatory control. The NRC's recently issued policy statement is the first step toward the promulgation of regulations which will allow for certain wastes which are currently classified as LLRW to be disposed of in regular landfills, incinerators, and sewers. These "below regulatory concern" or BRC wastes account for approximately 50 percent of the dry active LLRW (or 30 percent of all LLRW).

49. There is disagreement within the NRC itself as to the appropriateness of the NRC's recommendations. The EPA has indicated that the proposed policy, if adopted into regulation, may not adequately protect public health and safety. Furthermore, the NRC intends to make its BRC standard a compatibility requirement for Agreement States; that is, the NRC will require all states to adopt these standards verbatim, thereby precluding a state from establishing stricter environmental controls. The NRC presents no substantive health or safety reasons for prohibiting Agreement States from exercising control over exemption standards.

50. The DOE has actively discouraged the use of many of its already contaminated lands as LLRW disposal sites, even though the LLRWPAA in no way precludes this option.

51. Indeed, these examples, together with the NRC's policy against long-term on-site storage at reactor sites, clearly elucidate the degree to which the federal government is infringing on the ability of the states to effectively manage the waste, the damages from which they must assume full liability. The NRC and the DOE are following their traditional paths of promoting the nuclear power industry as specified in the Atomic Energy Act of 1954. These practices, particularly the NRC's prohibition on long-term on-site storage, may culminate in a public health and safety emergency in many states.

THE FEDERAL GOVERNMENT'S WASTE MANAGEMENT PRACTICES

52. The federal government responded to the challenge of developing a comprehensive national management plan for commercially generated LLRW by abdicating the responsibility of waste disposal to the states. This is ironic in light of the large number of DOF disposal sites throughout the nation which are in dire need of remediation. Past DOE nuclear operations have produced approximately 4,000 contaminated sites which require varying levels of remedial action (P. Whitfield et al., The Department of Energy environmental restoration program: Meeting the challenges, Proceedings of Waste Management 1990, Tuscon, Arizona).

53. As a specific example of the federal government's mismanagement of radioactive waste and deliberate attempts to shield itself from public scrutiny, consider the case of the Feed Materials Production Center in Fernald, Ohio. Records indicate that at this uranium reprocessing center of the federal government, the Atomic Energy Commission in 1953 stonewalled its contractor's attempt to remedy a water infiltration and overflow problem (bathtub effect) in the disposal trenches. Richard Shank, director of Ohio's environmental protection agency, estimated that 298,000 pounds of uranium waste has been released into the air from reprocessing plant operations. He estimated that 167,000 pounds of waste had been deliberately discharged into the Great Miami River over the 37 year operational period of the plant. An additional 12.7 million pounds of waste had been placed in pits, the integrity of which was uncertain.

54. The DOE has admitted that the government was aware of these practices and associated hazards all along, but it did not take action to remedy the situation. In fact, it took the federal government more than 30 years to admit that problems existed at Fernald. The gross mismanagement, which was ignored and exacerbated by government officials, is revealed in 300,000 pages of government memorandums, letters, and reports. In October 1989, a Cincinnati federal judge ordered the DOE to deliver $73 million to area residents who had filed a class-action lawsuit. ("They Lied To Us," *Time*, October 31, 1988, pgs. 60-65; "Bomb makers' secrets," *U.S. News & World Report*, October 23, 1989, pg. 22)

55. Clearly, the federal government has not met its own responsibilities in effective LLRW management. It has, in fact, continually violated sound waste management practices, and this has resulted in the contamination of vast areas of the country. Undoubtedly, in an attempt to shield its many violations from the eyes of the public, it is in the federal government's best interest to pass the responsibility for radioactive waste management on to the states.

TAKE TITLE PROVISION & POTENTIAL LIABILITY

56. In an unprecedented action, the 1985 LLRW Policy Amendments Act directs the states to take title to and assume full liability for damages resulting from LLRW produced within their respective borders in the event that in-state or in-compact management provisions are not made by January 1, 1996. No other waste generators, including those of the toxics and hazardous waste industries, are afforded this benefit. This provision creates the potential for tremendous liability on the part of the state.

57. In order to objectively evaluate the potential liability of a host area county or state with respect to radioactive waste management, it is necessary to investigate the costs associated with remediation programs which have occurred or which are in progress.

58. In the United States, there is not one example of a commercial LLRW disposal site which has completely maintained its integrity. Three of the existing disposal facilities closed within 10 to 15 years after beginning operations. The combination of operational practices, water infiltration, and seepage through two trench caps led to the closure of the West Valley, New York facility only 12 years after opening. The Maxey Flats, Kentucky site also experienced an ingress of water which led to migration of radionuclides from the burial ground. That site was closed 14 years after opening and has been designated as a "superfund" site. At Sheffield, Illinois radionuclide migration offsite has also been observed. When it was first opened, both the USGS and the State of Illinois certified it as leakproof. The site closed 11 years after open-

ing, and area residents are currently involved in remediation hearings.

59. In each instance, as is also the case at the three operating disposal sites, the disposal technology employed was shallow land burial; this is basically an adaptation of sanitary landfill practices. Although still allowable under NRC regulations, shallow land burial is prohibited by law in a number of states and compacts, including New York State. A number of disposal technologies involving engineered barriers are being considered, including concrete vaults and shallow mines. No operator in the U.S. has ever received a permit for any of these technologies.

60. According to the Kentucky Radiation Control Branch, Kentucky Division of Waste Management, since 1977 Kentucky taxpayers have spent $10 million to keep radioactivity from spreading from the Maxey Flats commercial LLRW disposal site. Maxey Flats has been designated a federal "superfund" cleanup site, and Kentucky officials believe that costs to prevent future leaks may be $40 to $60 million.

61. In Illinois, two years after closing, the Sheffield, Illinois LLRW disposal site was found to be leaking tritium. U.S. Ecology (then, Nuclear Engineering, Inc.) had abandoned the site in 1978. In 1978 the Illinois Department of Nuclear Safety (IDNS) sued U.S. Ecology for $98 million; the $98 represented IDNS's cost approximation in 1978 dollars for exhuming the entire LLRW site and shipping it to Richland, Washington. After 10 years of litigation, IDNS and U.S. Ecology settled out of court, and U.S. Ecology's cleanup costs are expected to range from $7 to $9 million. (Information was obtained through a conversation with a representative of IDNS.)

62. At the West Valley, New York LLRW disposal site, Nuclear Fuel Services, the operator, left void spaces in the trenches, which allowed for collapse of the trench caps and the ingress of water. Since the water could not drain through the impermeable soils, the trenches overflowed, washing radionuclides into nearby streams. The site closed in 1975, only 12 years after beginning operations. ("Low-Level Radioactive Waste Disposal: How Are States Settting Their Sites?", Irvin White & John Spath, *Environment,* Vol. 26, No. 8, October 1984) Nuclear Fuel Services abandoned the site. According to the New York State Energy Research & Development Authority, New York has spent $525,000 for pumping and maintenance of trenches. A site study is anticipated to be $1 million, and full cleanup costs have not yet been determined.

63. In the 1991 budget, an increase of more than half a billion dollars over the 1990 budget was requested for DOE. This requested increase was due primarily for the purpose of remediating the 4,000 contaminated waste disposal sites of the DOE (H.A. Kurstedt, Jr., Programmatic issues affecting the implementation of the DOE five year plan, Proceedings from Waste Management 1990, Tuscon, Arizona). According to newspaper reports, the GAO has reported to Congress that the total cost of the federal cleanup will exceed $150 billion.

64. A recently released Waste Tech News report states that cleanup costs at the Hanford reprocessing facility are estimated to run as high as $50 million. DOE's cleanup plans must address approximately 5 billion cubic yards of waste material, 1000 inactive waste sites that have been consolidated into four proposed superfund sites, 55 hazardous waste treatment and storage sites, and about 200 square miles of contaminated groundwater. Cleanup plans include the immobilization of 2.5 million gallons of mixed LLRW.

COSTS TO NEW YORK STATE & CORTLAND COUNTY

65. According to Angelo Orazio, Chairman of the New York State LLRW Siting Commission, as of August 1989 the Siting Commission had expended $11 million to perform its preliminary activities of candidate area selection. For the 1990-1991 fiscal year, the Siting Commission requested $19.6 million. Part of these funds was for the initiation of site characterization activities. Jay Dunkleberger, Executive Director of the Siting Commission, estimates characterization activities will cost $3 to $12 million per site, and the Siting Commission expects that two or three sites will undergo detailed characterization. The New York State Department of Environmental Conservation has estimated the cost of facility development and maintenance at $100 million (personal communication).

66. In December 1988, the NYS LLRW Siting Commission designated six townships in Cortland County as a "candidate area" for an LLRW disposal site. In September 1989, the Siting Commission selected two specific sites in the Cortland County Town of Taylor.

67. As a result of having been designated as a potential host community for an LLRW disposal facility, Cortland County has suffered significant financial harm.

68. Based on my conversations with numerous real estate agents in Cortland County, real estate sales in the sited Town of Taylor and in towns within close proximity to the sites have come to a virtual standstill. I have read newspaper reports which have stated that land values in the affected area have dropped by 30 to 50 percent. In instances where real estate transactions were in progress, upon discovering that the

county has two potential waste disposal sites, buyers have attempted to stop transactions.

69. I have received telephone calls from various residents within the affected areas who have stated that they were denied home equity loans because of the precarious position in which being designated as a potential host community has placed the county.

70. As a result of being designated as a potential site for an LLRW disposal facility, Cortland County has been forced to spend significant financial resources. Since February 1989 the county has expended approximately $310,000 on special legal, technical, and political consultants. Projected costs for continuing our involvement are estimated at $300,000 per year. This projected appropriation far exceeds Cortland County's 1990 budget allocations for a variety of programs, which include Juvenile Delinquent Care, Youth at Risk, Aid to Dependent Children, Alcohol Service Mental Health, Stop DWI, and the entire Planning Department budget. Costs are likely to be increased as the county's activities in litigation and special technical studies are heightened.

SOCIAL & POLITICAL UNREST

71. On November 15, 1989, the NYS LLRW Siting Commission came to Cortland County for a public hearing. Approximately 4,000 to 5,000 residents, or 10% of the county's entire population, attended the hearing to voice their opposition. Attendees were required to go through a metal detector and 50 extra security officers had been brought in from 20 different State University of New York campuses to support the Cortland College squad.

72. Protesters from Cortland County have followed Governor Mario Cuomo around the country. Since the designation of potential sites in Taylor, Cortland County citizens' groups have protested the Governor in New York City, Rochester, Albany, Syracuse, Liverpool, Cortland, and Springfield, Massachusetts.

73. On November 2, 1989, Taylor officials threatened to close roads to block access to the Siting Commission and its staff. *See* Exhibit B (attached hereto).

74. A landowner in Cortland County who volunteered property to the Siting Commission has received threats and has requested police protection.

75. On December 13, 1989, protesters in Cortland County attempted to block the Siting Commission from access to the Taylor Central site. State officials were able to get on the sites, but, due to actions of the protesters, the officials' "walkover" had to be abandoned. Upon the state officials' attempt to move to another section of the site, opponents of the disposal site trapped state workers in their cars for about two and one-half hours. The county sheriff's department eventually escorted state workers from the site on foot. Seventeen of the sheriff's department's 25 patrol officers were present on this day to contend with the protests. Twenty protesters were arrested for disorderly conduct. *See* Exhibit C (attached hereto). The sheriff's department's protection of the Siting Commission has caused a great rift in the community.

76. In mid January 1990, Cortland County District Attorney Richard Shay sent a letter to Governor Cuomo in which he stated his intention to take "immediate steps to terminate all charges pending against those individuals arrested in Taylor on December 13, 1989." In a letter of response, John J. Poklemba, Director of Criminal Justice for New York State,

indicated that, in the opinion of the Special Review Committee, Mr. Shay had not carried out the responsibilities of his office.

77. On January 19, 1990, the Siting Commission again attempted to gain access to the sited areas in Cortland County. Protesters had established road blocks on all roads leading to the sites. The car of the approaching state workers was blocked in by a number of protesters, and state workers were kept from getting within five miles of either site. *See* Exhibit D (attached hereto).

78. In March 1990 the Siting Commission established a local information office in the Cortland County Town of Cincinnatus (which is a town adjacent to Taylor). Opponents resented and vehemently protested the presence of the Siting Commission and its staff in the community. On March 1, 1990, six protesters were arrested for blocking state officials' access to the office. On March 3, 1990, three more protesters were arrested. On March 8, 1990, six protesters were arrested. On March 15, 1990, the state hired a guard for the information office. On a number of occasions, animal carcasses were piled in the doorway of the office, making it nearly impossible for state workers to keep the office open. On April 12, 1990, the sheriff requested a weeklong "cooling off" period, and the office remained closed. In late April, after numerous requests from Cortland County government officials, citizens, and area state representatives, Governor Mario Cuomo directed the Siting Commission to close the office to avoid further conflict.

I, Cindy M. Monaco, do hereby swear that the facts stated in this Affidavit are true and correct to the best of my knowledge, information, and belief.

(Sworn to by Cindy M. Monaco, September 5, 1990.)

Exhibit A—Letter.

AGREEMENT AND NON-AGREEMENT STATES
COMPACT DISTRIBUTION

STORAGE OF LOW-LEVEL RADIOACTIVE WASTE (SP-90-80)

In a letter dated February 16, 1990 (SP-90-27) we transmitted to you a copy of a Nuclear Regulatory Commission (NRC) Information Notice No. 90-09, "Extended Interim Storage of Low-Level Radioactive Waste by Fuel Cycle and Materials Licensees." This notice provided guidance to licensees planning to submit license amendment request for extended interim storage of waste. The notice stated that storage is not a substitute for disposal, and that waste should be stored only when disposal capacity is not available and for no longer than necessary. Also, the notice stated that license amendment requests should include final disposal plans which specify when and where waste will be shipped for disposal, and that storage authorizations will not normally be granted for more than five years. This notice is consistent with discouraging long-term storage beyond January 1, 1996.

Since this information notice was sent to you, the Commission in a memorandum dated February 14, 1990 informed the NRC staff that, ". . . the Commission will not look favorably upon long-term onsite storage of low-level waste beyond January 1, 1996." That date is the final deadline for development of low-level radioactive waste (LLW) disposal capacity. States, either acting alone or as part of a Regional Compact, which are unable to provide LLW disposal by that date must take title to, and possession of LLW generated in their States, as well as be liable for any direct or indirect damages for failing to do so promptly.

The purpose of this letter is to encourage Agreement States to adopt a similar view regarding storage of LLW beyond January 1, 1996, and to inform their licensees, as appropriate, of their policy on extended storage of LLW.

If you have a different view on extended LLW storage, we would be interested in your position. A written expression of your position on this matter would be appreciated. If you have any questions, please contact Ms. Cardelia Maupin at 301-492-0312.

VANDY L. MILLER,
Assistant Director for State Agreements Program
State Programs
Office of governmental and Public Affairs

Exhibit B—Newspaper Article.

11/2/89

TAYLOR OFFICIALS COULD CLOSE ROADS

By CONSTANCE M. NOGAS

The Town of Taylor may have the power to legally close its roads and refuse to allow state Low-level Radioactive Waste Siting Commission workers to perform pre-characterization on two finalist sites for a radioactive waste dump in Taylor.

Pre-characterization is a series of tests such as drilling wells that will be done on five finalist sites for a dump, including the other three sites which are in Allegany County. The tests will determine which two sites should be selected for further studies.

Taylor Supervisor Robert Pudney has raised questions about whether the town could declare a state of emergency or somehow close the roads to the testers and their equipment. Pudney believes that the situation is developing into a confrontation between the people of state and Gov. Mario Cuomo. He wonders what would happen if the whole town board decided to resign and if Cuomo would then have to appoint a new town board.

Pudney told The *Cortland Standard* Tuesday that these were simply ideas he had, and he referred the legal questions to Thomas Meldrim, Taylor town attorney. Meldrim declined to comment on the issue.

Pudney's ideas turned out to be correct. If the entire town board resigned, Gov. Mario Cuomo would make interim appointments and then a special election would have to be held, Harry Willis, a senior attorney and local government counsel for the Department of State in Albany, said.

Article V Section 104 of Highway Law states that the county highway superintendent has the power to close a state highway in an emergency. There is nothing in this law that

prevents a town from closing the raid, said Pat Snyder, the attorney hired by the county to fight the dump issue.

This section of the law was amended to include a town highway superintendent closing a town road "if it shall appear necessary." It may be necessary in this case although this could be argued, Snyder said.

The town highway superintendent also has the right to sue the siting commission if the work was done wrong and somehow damaged the roads under Article VII, section 140 of Consolidated Law Service.

Pudney as supervisor may have the power to close the roads himself, if the town board passed a resolution asking him to do so. Section 276 of Town Law gives the town supervisor the power to do whatever the town board asks him to do, providing that it is legal.

11/2/89

YOUR OPINION PROTEST QUILT PLANNED

To the Editor:

To Cortland County quilters and potential quilters:

Anyone interested in participating in the construction of a county-wide quilt, in protest of the proposed low-level radioactive waste dump, please contact me at (607) 863-3980 for details.

The more blocks made, the stronger our statement will be. The theme of the quilt will be positive, i.e., depicting the things we love about this county or earth, your lifestyle, people, special events, geography, etc.

If anyone has any extra cotton, poly-cotton fabric they can donate, it would be greatly appreciated.

Thank you,
Mary Weber

Exhibit C—Newspaper Article.

20 DUMP OPPONENTS ARRESTED

BY TRISH PROSPERO
AND CONSTANCE M. NOGAS

Despite the arrest of 20 people for civil disobedience, yesterday's demonstration in Taylor against the state's nuclear waste dump project was peaceful, the Cortland County Sheriff's Department reported.

Siting commission representatives wanted to tour property in the town proposed for the dump when members of Citizens Against Radioactive Dumping tried to stop them.

Commission representatives wanted to establish access routes for equipment that will be used to complete the preliminary suitability study of potential dump sites sometime next month.

When the state crew reached the bottom of the hill on Jordan Road shortly after noon, they were met by a group of about 20 protesters who tried to block them from leaving the road. Deputies moved them back and some shoving occurred during which time CARD's disobedience organizer, Tom Cummins, apparently touched either one of the deputies or one of the workers who had just walked down the hill.

"I feel I was arrested because I am chairman of civil disobedience and non-violent resistance group of CARD," he told a crowd gathered on Jordan Road near the second vehicle after he went back up the hill on Jordan Road.

At about 12:25 p.m., Undersheriff Lee Price spoke to the estimated 14 people who surrounded the other car on the top of the hill and on the property of Roland Elwood. Inside that vehicle were Jay Dunkleberger, siting commission executive director; Ted Adams, Cortland County's liaison with the siting commission; and John Thomas, a former aide to state Assem-

blyman Clarence Rappleyea, who now works for Weston, the firm hired to do the tests.

More protesters, approximately 50 in all, crowded around. Price told them they would be charged with disorderly conduct if they didn't move.

"We want these people to know that we don't want them here ever," Cummins said, "If anyone else would like to join me now in Taylor, you can be arrested now."

About 14 people accepted this invitation but the arrests were made peacefully with no one having to be dragged away from the car although they did sing "Jingle Bells" and "We Wish You A Merry Christmas." Everyone then walked down the hill where the siting commission representatives were safely driven away to an undisclosed location outside the county. When those arrested arrived at the bottom of the hill to receive an appearance ticket in a sheriff's van, they were greeted with cheers.

Exhibit D—Newspaper Article.

N—DUMP OPPONENTS CLAIM TRIUMPH

BY CONNIE NOGAS

TAYLOR—"The people's will shone strongly today," said Jean Weiss of Marathon, one of about 200 dump opponents from Cortland and surrounding counties who twice turned back a state team that came to here yesterday to examine access routes to one of Taylor's two finalist radioactive waste dump sites.

Anti-dump opponents who manned at least four highway checkpoints claimed victory after the three-man state team retreated without reaching its objective, but one member of the state team vowed they'd be back.

No protesters were arrested during the two separate blockades at two different intersections on Taylor Valley Road: the Cheningo-Solon Pond Road intersection and the Hawley Woods Road intersection.

The state team never reached its goal of inspecting the Taylor North Site on nearby Allen Hill Road to determine access for drilling rigs and to decide where soil and other tests would be conducted beginning in February. The first roadblock stopped them about six miles away, the second about five miles away.

Most of the 730-acre site is owned by dairy farmer Arthur Allen who offered his land to the state for use as a dump. Allen wasn't available for comment late yesterday afternoon because he was reportedly milking his cows but he did speak to CARD members in the afternoon, said his wife, Sondra. She declined further comment on what was said.

About 15 anti-dump opponents, whose numbers later swelled to about 30, prevented a car carrying three siting commission representatives from entering the Cheningo-Solon Pond Road entrance for nearly an hour beginning at 9:15 a.m.

Inside the car were Ted Adams, the liaison between the New York State Low-level Radioactive Waste Siting Commission and Cortland County; Steve Choiniere of Dunn Geoscience of Albany, and Ben Tencer of Roy F. Weston Inc., the siting commission's main contractor.

At approximately noon, the trio again tried to reach the Allen farm by a different route but were met by about 30 slogan-shouting protesters near the intersection of Hawley Woods and Taylor Valley roads. Four Cortland County Sheriff Department officers were already at the scene and did not escort the car through the roadblock. More protesters and five more officers arrived later.

Dump opponents stopped the car by linking arms halfway around it in a semicircle while three protesters sat down in the road directly in front of the car. Eventually, over 100 people were milling around the car while other people stayed back to man other checkpoints.

"I felt that was my place," said Todd Rogers of Syracuse, a member of the environmental group Earth First, who sat down in front of the state men's car along with Citizens Against Radioactive Dumping members Gene Schepker of Cortland and David Pandori of Truxton. "That's what we're here for. We're here for the planet."

Ironically, yesterday was Rogers' birthday. What did he want for a present? "No dump!" he said.

Young and old were present from Taylor and other areas of the county as well as Broome, Onondaga, and Chenango Counties. Even a local political official linked arms with other protesters.

"I'll stand with the people," said Gerry Duffy of Cortland, the Republican chairman for the city. He said his involvement showed that the Republican Party really cares and is concerned about it the dump issue.

Protesters, many representing anti-dump groups other than CARD, occasionally shouted their opposition to the dump

coming to Taylor. And one protester, reportedly from Linklaen, rode his horse to the scene.

Meanwhile, the three state men spent the almost two-hour standoff inside the car by eating lunch from Wendy's and ignoring the shouts of protesters as Tencer also photographed the crowd from his vantage point in the back seat. They did speak briefly to the press, however.

"We expected the public opposition," Adams said. "Our interest is not to have anyone arrested at all. Our job is to progress forward."

Adams called the sheriff's department's handling of the day's activities, "very commendable" and promised to return but refused to specify what day.

At 12:35 p.m, four more sheriff's department officers arrived. Lt. Chauncey Bennett Jr. then told the crowd that if they didn't move, they would face charges of disorderly conduct for blocking traffic and obstructing a governmental agency because the siting commission is a state agency.

"We would like them arrested for harassment of the people and destruction of our lands," Weiss shouted back.

No one moved even after Bennett asked them to move a second time about five minutes later. Finally, protesters allowed the state men to turn their car around and leave about 1:45 p.m. Adams said the group was headed back to Cortland to assess what to do next but they never came back to Taylor again on Friday.

State officials say they have obtained the assess information they need for the Taylor Central site south of Allen's farm. Twenty dump opponents were arrested when state officials went to that site last month.

More than 30 anti-dump protesters were arrested earlier this week in Allegany County where the state has selected three other potential sites for a radioactive waste dump.

Affidavit of Clarence D. Rappleyea, Jr. in Opposition to Motion to Dismiss Complaint (dated 9/5/90).

CLARENCE D. RAPPLEYEA, JR., being duly sworn, deposes and says:

1. That I am the Assemblyman representing the 122nd Assembly District in the New York State Assembly, which district encompasses the County of Cortland, State of New York. My Assembly office is located in Room 933, Legislative Office Building, Empire State Plaza, Albany, New York 12248 and I also maintain a District Office at 17 Main Street, Cortland, New York 13045.

2. Additionally, I have been duly elected by the Republican Conference in the New York State Assembly to serve as the Minority Leader of the New York State Assembly and I have served in this position since 1983.

3. That I also am an Attorney, duly admitted to practice law in the State of New York and I conduct a law practice at Hinman, Howard and Katell, Esqs., 2 Hayes Street, Norwich, New York 13815, which office is located in the County of Chenango, State of New York.

4. That I make this affidavit in support of the instant action brought by the Plaintiffs seeking a declaratory judgment finding that the Low-Level Radioactive Waste Policy Amendments Act of 1985 is unconstitutional and, therefore, null and void.

5. As the Assemblyman representing Cortland County, one of the Plaintiffs herein, and as Minority Leader in the New York State Assembly, I submit this affidavit to offer affirmations and documents relevant to the enactment of Chapter 673 of the Laws of 1986 of the State of New York (Assembly Bill

11729/Senate Bill 9616) and, upon information and belief, to set forth my understanding of the legislative intent related to the adoption of such statute.

6. On July 3rd, 1986 the New York State Assembly and Senate during the final hours of the 1986 Legislative Session passed legislation referred to as Senate Bill 9616 (Assembly Bill 11729) regarding management of low-level radioactive waste generated in New York State. As evidenced by the Assembly roll call, a copy of which is attached hereto as Exhibit A and made a part hereof, the New York State Assembly voted 144-0 in favor of the adoption of this legislation at 1:22 p.m. on said date. Similarly, the New York State Senate also voted unanimously on July 3rd to adopt Senate Bill 9616 as indicated in the Senate roll call, a copy of which is annexed hereto as Exhibit B and made a part hereof.

7. Annexed hereto as Exhibit C is the two page transcript of the Assembly proceedings on July 3rd, 1986 for Senate bill 9616. The transcript reflects the proceedings of the New York State Assembly wherein this legislation was called for an immediate vote without any debate.

8. Upon information and belief, subsequent to passage by both Houses of the New York State Legislature, said bill was signed into law by Governor Cuomo and became Chapter 673 of the Laws of 1986 for the State of New York, a copy of which is annexed hereto as Exhibit D and made a part hereof. Your deponent respectfully refers to Section 2 of said Chapter 673 which clearly references the federal Low-Level Radioactive Waste Policy Act and the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 as the impetus for New York State to take immediate steps in connection with the selection of disposal methods for the siting, construction and operation of management facilities in New York State. Said legislative findings identify the January 1st, 1993 milestone,

as established by federal statute, as the principal foundation for the passage of this legislation.

9. Your deponent respectfully asserts that in the absence of such federal mandates, the New York State Assembly would not have acted during the 1986 Legislative Session to consider and pass New York's Low-Level Radioactive Waste Management Act (Chapter 673 of the Laws of 1986 for the State of New York).

10. In furtherance of my assertion that the New York State Legislature acted in response to federal dictates, annexed hereto as Exhibit E is a copy of the bill jacket for Chapter 673 of the Laws of 1986 for the State of New York. To the best of my knowledge as a Member of the Assembly, subsequent to the passage of legislation, the Governor's office circulates such legislation for comment by appropriate state agencies and other interested third parties to solicit and compile opinions regarding the adoption or veto of bills that have passed the Legislature. An extensive bill jacket was accumulated on Senate bill 9616 and each submission in said bill jacket emphasizes the federal requirements and milestones of the Low-Level Radioactive Waste Policy Act of 1980 and the Low-Level Radioactive Waste Policy Amendments Act of 1985.

11. In support of Plaintiffs' Complaint, I further allege, upon information and belief, that the federal compulsion which led to the adoption of Chapter 673 of the Laws of 1986 in New York State has further imposed a disruptive impact on governmental processes at local and state levels. The siting process required by federal statute to be undertaken in New York State has had severe ramifications for the County of Cortland and the State of New York, in terms of both social and economic cost. Extensive public outcry, including public rallies and demonstrations, the formation of constituent groups opposing the siting process, instances of public reaction which

could be deemed civil disobedience, and all the attendant law enforcement problems and expenses related to maintaining public safety have been thrust upon the County of Cortland as it attempts to respond to its selection as a potential disposal site. Such public reaction is more fully described in the affidavit submitted on behalf of the County of Cortland but as its Assemblyman, I can attest to the prominence of this issue both for local and county officials, as well as state representatives.

12. Upon information and belief, the siting process has detrimentally affected the economic development of Cortland County in that land values have depreciated and the number of land transactions has declined. Potential businesses have questioned the feasibility of locating in the County, and the public has demanded further information regarding public health and safety in the event of the establishment of a low-level radioactive waste disposal facility within their locale. Although these concerns are more particularly addressed in the submissions from Cortland County, as a Member of the Assembly I have received approximately 3500 letters or mailings from my constituents voicing their opposition to the siting process and questioning the need for New York state to establish a disposal facility in light of the decreasing volume of low-level radioactive waste produced not only in New York State but nationwide.

13. Unquestionably the federal compulsion which caused New York to enact Chapter 673 of the Laws of 1986 has propelled Cortland County into a period of turbulent public reaction occasioning additional governmental costs, not only for law enforcement expenditures but to properly respond to the scientific and technical issues involved in the siting process. These political, social and economic burdens would not have been experienced in Cortland County but for the federal actions at issue in this proceeding.

WHEREFORE, your deponent respectfully requests that this Court deny the Defendants' motion to dismiss.

(Sworn to by Clarence D. Rappleyea, Jr., September 5, 1990.)

United States Exhibit A—(included in the Compilation of Declarations and Exhibits filed on October 26, 1990)—Declaration of Stephen N. Solomon (dated 10/25/90).

I, Stephen N. Salomon, do hereby declare that:

1. I am a Technical Analyst for the State, Local and Indian Relations Division of the Office of State Programs, Office of Governmental and Public Affairs, U.S. Nuclear Regulatory Commission. My Office is located at 11555 Rockville Pike, Rockville, Maryland 20852.

2. I have worked with the U.S. Nuclear Regulatory Commission (NRC) and its predecessor agency since August 1973. Since 1980 I have been primarily involved in low-level radioactive waste (LLRW) issues facing the States. My responsibilities include formulating NRC positions with regard to compact formation and the development of the Low-Level Radioactive Waste Policy Amendments Act of 1985. Other positions that I have held at NRC include Technology Assessment Specialist in the Cost-Benefit Analysis Branch, Environmental Economist for the Nuclear Energy Center Site Survey, Federal-State Siting Action Study, and State and local funding for emergency preparedness.

3. Low-level radioactive waste in New York State is generated by utilities and by "materials licensees." The utilities, which operate seven nuclear power plants, are regulated by NRC. New York State, because it is an Agreement State, regulates approximately 1,900 material licensees, many of whom generate LLRW. They are divided into four categories—academic, government, industrial and medical. In addition, within New York there are 75 NRC materials licensees, some of which engage in activities related to the production of nuclear power.

AGREEMENT STATES PROGRAM

4. From NRC's perspective, the Agreement States Program is one attractive means of implementing the NRC's health and safety mission as it relates to radioactive materials and LLRW. The 29 Agreement States regulate approximately two-thirds of the users of radioactive materials in the United States and a large portion of the nation's LLRW activities. The program is funded and administered individually by the 29 Agreement States except for the NRC oversight function and the NRC training program for the States.

5. The Commission has recently reaffirmed its clear support for the Agreement State Program; and it believes that the programs are among the most efficient and effective means it has to protect the public health and safety in the materials area. The Commission strongly supports the continuation of funding for State Personnel to attend NRC training programs, with the Commission's resources, and with encouragement to the States to share costs where possible.

TRANSPORTATION AND ENVIRONMENTAL REGULATION OF LLRW

6. The transportation of low-level radioactive waste is recognized as an important element of low-level radioactive waste disposal by all the interested Federal agencies and by the States. Because New York is an Agreement State, it must adopt regulations that are compatable with federal regulations which establish requirements for packaging, preparation for shipment, and transportation of radioactive material and apply to any person who transports radioactive material or delivers radioactive material to a carrier for transport. The State must also adopt the regulations of the U.S. Department of Transportation for interstate and intrastate transportation.

7. In the case of New York State, under Section 14(f) of the New York Transportation Law, 17 N.Y.C.R.R. 507, the Commissioner of Transportation is empowered to promulgate rules and regulations governing the classification, description, packaging, marking, labeling, and preparation of all hazardous materials in accordance with the regulations promulgated by the U.S. Department of Transportation in 49 CFR Parts 170-189. Many types of low level radioactive waste are included in the definition of hazardous materials.

8. The NRC has a history of cooperating with the State of New York in other areas of mutual interest. For example the NRC has cooperated with New York State in the area of environmental regulation of activities involving radioactive waste, by signing a memorandum of understanding (MOU). The MOU is between the New York State Board on Electric Generation Siting and the Environment, the Departments of Environmental Conservation and Public Service, and the NRC. It sets forth mutually agreeable principles of cooperation relating to environmental matters in areas subject to concurrent jurisdiction under State of New York and Federal laws and regulations governing approvals, licensing and regulation of nuclear electric generating facilities. The intent of the MOU is that the Siting Board, the two State agencies and the NRC regularly consult and cooperate in exploring and implementing appropriate procedures designed to assure that delays in the siting of electric generation facilities and duplication of effort will be minimized and that effective use will be made of resources of the two State agencies and the NRC, particularly in the areas of professional expertise.

TECHNICAL ASSISTANCE

9. The State Programs Office provides a central point of contact at NRC for the States and low level waste compacts on regulatory issues involving the management and disposal of

LLRW. Other NRC offices, such as the Division of Low-Level Waste and Decommissioning (within the Office of Nuclear Material Safety and Safeguards), and the Division of Engineering (within the Office of Nuclear Regulatory Research), provide additional technical assistance, as required. The Regional State Liaison Officers monitor State and compact actions in developing new disposal capacity and provide information and assistance as appropriate. Assistance is also provided to Agreement States or States seeking Agreement State status on staffing capabilities, program organization, analytical methods for predicting disposal site performance, environmental monitoring, and review and comment on the license review process and any difficult licensing questions. Several other federal agencies provide training as well. *See* "Funding the NRC Training Program for States," NUREG-1311, June 1988 and "State Cost Sharing of Training," NUREG-1336, August 1989.

10. The funding provided for Agreement State training is currently budgeted at $695,000 annually. Of this amount, $390,500 is associated with travel and per diem expenses of State personnel.

11. For low-level radioactive waste, the NRC has offered, for example, the following training courses during the last year for the States: LLRW Disposal Regulatory Workshop, September 7-8, 1989; LLRW Research Program, April 24-25, 1990; LLRW Disposal Regulatory Workshop, June 19-21, 1990; LLRW Performance Assessment Workshop, September 26-28, 1990; and Nuclear Transportation, September 24-28, 1990. Members of New York's Departments of Health, Conservation, or Labor attended each of these courses.

12. One training course involved participation in NRC's mock technical review of the prototype license application safety analysis report (PLASAR) prepared by the U.S. Depart-

ment of Energy for alternatives to shallow land burial—an earth-mounded concrete bunker and below-ground vault. The objectives of the review were: (1) to provide assistance to Agreement States and regional compacts by identifying acceptable and unacceptable alternative design features and concepts; and by demonstrating how to use the Standard Review Plan NUREG-1200, Rev.1, to conduct a licensing review; (2) to provide the NRC staff and State regulatory personnel with experience in using the Standard Review Plan to conduct a review of a LLRW facility; and (3) to identify weaknesses in the Standard Review Plan and licensing process that could lead to recommendations for improvements. (The Standard Review Plan provides guidance to NRC staff reviewers who perform safety reviews of applications to construct and operate LLRW disposal facilities.)

13. The NRC recently provided technical assistance to Utah, Texas, Nebraska, Michigan and New York in establishing their LLRW regulatory programs and in meeting the requirements of the Low-Level Radioactive Waste Policy Amendments of 1985. Technical assistance was also provided to Pennsylvania, Nebraska and New York in formulating LLRW regulations compatible with NRC regulations. Assistance on specific cases was furnished to Florida, Utah, Colorado, Georgia and Nevada.

14. During 1974, New York State and New York City participated in a joint DOT/NRC radioactive material transportation surveillance program. Many other State participated in this joint program between 1977 and 1981. This joint program laid the basis for the State Hazardous Materials Enforcement Development (SHMED) Program of the U.S. Department of Transportation, which provided guidance to states on regulation and enforcement of LLRW transportation.

15. States have taken a variety of approaches in order to comply with the 1985 Act, with respect to siting, building, operating and funding. Most states or compacts have chosen to have private contractors operate the disposal sites. The State of California and has contracted with its "licensee designate", a private company, to site, design, apply for a license, construct and operate the disposal facility. The State itself will be involved only in licensing and regulating the facility.

16. States are considering a variety of disposal methods, including above- and below-ground vaults, earth-mounded concrete bunkers, below-ground canisters, and shallow land burial. New York is considering a number of alternatives, including deep vertical shaft mined disposal, and above ground monitored retrieval disposal.

17. The U.S. Department of Energy has funded transportation related studies designed to assist the States in deciding how to best regulate the transportation of low-level radioactive waste.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 25, 1990

STEPHEN N. SALOMON

United States Exhibit B—(included in the Compilation of Declaration and Exhibits filed on October 26, 1990)—Declaration of Richard L. Bangart (dated 10/25/90).

I, Richard L. Bangart, hereby declare that:

1. I am the Director of the Division of Low-Level Waste Management and Decommissioning, U.S. Nuclear Regulatory Commission. My Division has responsibility for the performance of safety and environmental reviews of applications for licenses for low-level radioactive waste (LLW) disposal facilities. I have held previous positions within NRC as Director of the Division of Radiation Safety and Safeguards in Region IV and Section leader in the Office of Nuclear Reactor Regulation where I had inspection and licensing responsibility for assuring safe management and disposal of radioactive wastes by NRC licensees.

2. The NRC is an independent regulatory agency of the Federal Government created under the Energy Reorganization Act of 1974. NRC has responsibility to assure that civilian uses of nuclear materials are carried out with proper regard and provision for the protection of public health and safety, of the environment, and of the national security. The NRC has no developmental or promotional responsibilities for civilian uses of nuclear materials.

3. The NRC carries out its mission through the licensing and regulatory oversight of nuclear reactor operations and other activities involving possession and use of nuclear materials, through the issuance of rules and standards, and through inspection and enforcement actions.

4. NRC's licensing procedures and regulations are set out in Title 10, Code of Federal Regulations (CFR). NRC's regulations for licensing the disposal of LLW in are set out in 10 CFR Part 61. Agreement States adopt and implement regulations which are compatible to Part 61. Other non-Agreement States are subject to Part 61. Thus, all LLW disposal facilities must meet Part 61 or compatible Agreement State regulations. The purpose of Part 61 and compatible Agreement State regulations is to ensure that LLW disposal facilities licensed under the regulations will protect the public health and safety and the environment.

5. Part 61 was developed over an approximate five year period and included extensive public, State and industry input and preparation of supporting draft and final environmental impact statements. It was published as a final rule on December 27, 1982.

6. Problems in siting, operations and financial assurance were experienced at four of the six early commercial LLW disposal facilities including West Valley (licensed by New York State), Maxey Flats (licensed by Kentucky), Sheffield (licensed by Atomic Energy Commission (AEC)), and Beatty (licensed by Nevada and AEC). The requirements included in Part 61 are based on both the positive, successful operating experience as well as the lessons learned from poor operating performance of past LLW disposal sites and operations. Part 61 is directed at ensuring that past problems in LLW disposal facility siting, operations and financial assurance will not recur in the future.

7. Part 61 establishes requirements in four major areas. First, it establishes the administrative and procedural requirements which NRC will apply in licensing LLW disposal facilities. Second, it establishes overall performance or safety objectives which must be achieved in the land disposal of LLW. Third, it establishes specific technical requirements for near surface disposal in the areas of siting, disposal facility

design, facility operations, facility closure, environmental monitoring, waste form, waste classification, financial assurance, land ownership and institutional control. Fourth, it establishes requirements which licensees who generate waste must meet when shipping such waste to a disposal facility.

8. The technical requirements of Part 61 apply to the near surface disposal of LLW. Shallow land burial is one near surface disposal technique. Some States have precluded use of shallow land burial through legislation. A State may preclude use of a particular technique, such as shallow land burial, for its own reasons and use another alternative near surface disposal technique such as a below ground vault.

9. In response to the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LRWPAA), NRC developed and published guidance on licensing alternative near surface disposal techniques. In December 1986 NRC published a technical position, NUREG-1241, "Licensing of Alternative Methods of Disposal of Low-Level Radioactive Waste." In January 1988, NRC published revisions to the standard format and content guide and standard review plan for alternatives that would be constructed of cement material with earthen covers such as below-ground vaults and earth mounded concrete bunkers. Guidance for licensing other land disposal methods, such as mined cavity disposal, has not been developed and such facilities would be handled on a case by case basis.

10. The four performance or safety objectives established by Part 61 are to: protect the general population from releases of radioactivity, protect individuals from inadvertent intrusion, protect individuals during operations and ensure stability of the site after closure.

11. The siting requirements identify both desirable site characteristics as well as characteristics to avoid, and apply to the broad range of geologic, hydrologic, meteorologic, and climatic conditions that will be reflected in siting locations throughout the country. The site suitability requirements are also intended to function collectively with requirements on facility design, operations, closure, waste form and classification to assure isolation of LLW.

12. Under the LLW classification system established in Part 61, LLW is divided into three categories (Class A, B, or C) based on the radionuclides present in the waste and their radioactivity concentration. Specific concentration limits are established for each waste class.

13. The concentration limits are based on analyses of potential biological hazard and include consideration of factors such as the radiotoxicity, physical half life and biological half life of the radionuclide. Class A waste has the lowest concentration limits, Class C the highest. LLW which exceeds the concentration limits for Class C waste is generally not acceptable for near surface disposal and requires prior evaluation and approval for disposal at a near surface disposal facility.

14. The classification system is progressive in nature. As the waste class, and thus, associated hazard potential of the waste increases, the requirements in Part 61 placed on disposal of that waste class increase. Class A waste must meet minimum waste form requirements and must be disposed of in separate disposal units from those used for disposal of Class B and C waste. Class B and C waste must meet the minimum waste form requirements and additional waste form stability requirements. Class C waste must be disposed of at greater depths or with additional barriers to provide additional protection against inadvertent intrusion.

15. The classification system establishes a limit on the concentration of long-lived radionuclides present in Class C waste and a lower concentration limit for class A and B waste. Long lived radionuclides may be present in all three waste classes, but at concentration limits that are dependent on the waste class.

16. Part 61 allows the concentration of a radionuclide to be averaged over the volume of the waste or weight of the waste including the volume or weight of the solidification media used to encapsulate the waste. It is not acceptable, however, to intentionally combine different waste types of different waste class or to add unlimited volumes or weights of solidification media to intentionally dilute and lower the waste class.

17. Under the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPAA), States are responsible for providing disposal capacity for Class A, B, and C wastes as defined in Part 61. Wastes exceeding the Class C concentration limits are a responsibility of the Federal Government. Under the LLRWPAA, States also have the prerogative to elect to accept LLW exceeding the Class C concentration limits for disposal.

18. Currently, the majority of LLW falls into the Class A category (approximately 96% of the total volume is Class A waste. Approximately 3% is Class B and 1% Class C.) Class C waste accounts for approximately 54% of the total activity, Class B 36% and Class A 10%. These numbers vary from year to year, and among generators, based on factors like advances in technology.

19. The LLRWPAA establishes a series of milestones, incentives and penalties for the development of new disposal capacity by States. While such disposal capacity is being developed, NRC recognizes that licensees currently have and

will continue to have need to store LLW for an interim period of time either prior to shipment for disposal at existing disposal facilities or while such new disposal capacity is developed.

20. NRC views storage of LLW as a short term interim step between generation of waste and ultimate disposal, not as a substitute for the development of new disposal capacity. In the interests of protecting the public health and safety and maintaining occupational exposures as low as reasonably achievable, the length of time LLW is placed in storage should be minimized. Guidance on storage of LLW at reactors and materials licensees is set out in two Generic Letters for reactors (Generic Letters 81-38 and 85-14) and Information Notice 90-09 for materials licensees. NRC has also issued Information Notice 89-13 to provide information to licensees on actions they should consider in the event they are denied access to the currently operating disposal facilities. Generic Letter 81-38 is attached as Exhibit *P*.

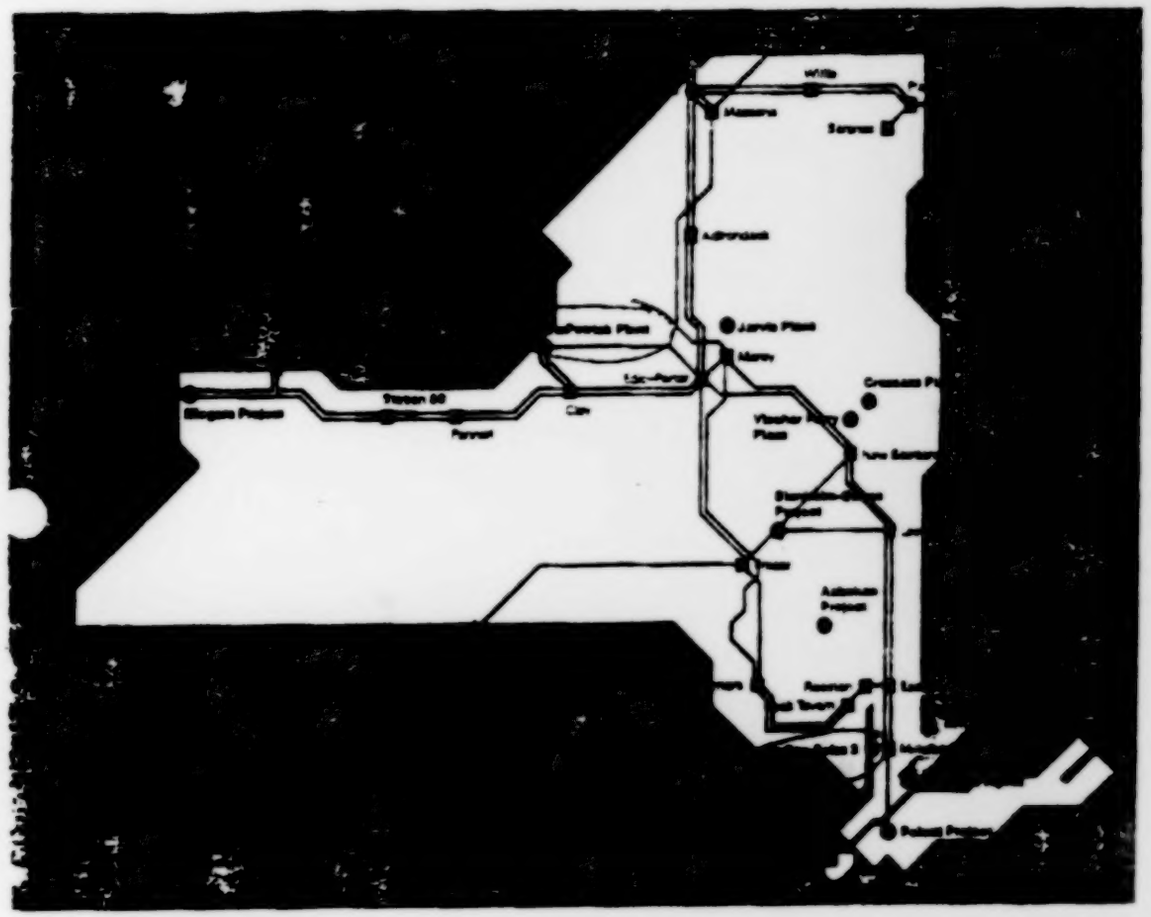
Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 25, 1990

RICHARD L. BANGART

United States Exhibit E—New York Power Authority Annual Report for 1989 (Exhibit only includes the cover and pages 25-27 of the report.).

Source: NY Power Authority Annual Report for 1989



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(25) POWER AUTHORITY FACILITIES

St. Lawrence-Franklin D. Roosevelt Power Project

Location: Massena, on the St. Lawrence River

Net Dependable Capability: 800,000 kw

First Commercial Power: July 1958

1989 Net Generation 6.5 billion kwh

Net Generation Through 1989 210.5 billion kwh

Principal Features:

Robert Moses-Robert H. Saunders Power Dam: runs from Barnhart Island in the United States to Cornwall, Ontario. Thirty-two generators-16 on each side of the international boundary. Length, 3,200 feet; height, 167 feet; width, 184 feet. Hydraulic head: 81 feet.

Long Sault Dam: extends 2,960 feet from the New York mainland to Barnart Island.

Iroquois Dam: located 25 miles upstream from Long Sault Dam near Iroquois Point in Canada. Controls outflow from Lake Ontario. Length, 1,980 feet; height, 67 feet; width, 80 feet.

Niagara Power Project

Location: Lewiston, on the Niagara River

Net Dependable Capability: 2,400,00 kw

First Commercial Power: January 1961

1989 Net Generation: 14.2 billion kwh

Net Generation Through 1989: 425.9 billion kwh

Principal Features:
Two water intakes on the Niagara River, located two and a half miles upstream from the Falls.

Two underground conduits, each 46 feet by 66 feet, carry water four and a half miles under the City of Niagara Falls to a forebay connecting the Robert Moses and Lewiston plants.

Robert Moses Niagara Power Plant: 13 turbine-generators. Length, 1,840 feet; height, 389 feet; width, 580 feet. Hydraulic head: 305 feet.

Lewiston Pump-Generating Plant: 12 pump-generators, each rated at 20,000 kw; 1,900-acre storage reservoir.

Blenheim-Gilboar Pumped Storage Power Plant

Location: Blenheim and Gilboa in Schoharie County, about 40 miles southwest of Albany.

Net Dependable Capability: 1,040,000 kw

First Commercial Power: July 1973

1989 Gross Generations: 1.4 billion kwh

Gross Generation Through 1989: 24.7 billion kwh

Principal Features:
Lower reservoir: 420 acres on Schoharie Creek. Upper reservoir: 390 acres on Brown Mountain. Connecting tunnel system: vertical shaft and horizontal tunnel branching into four penstock tunnels. Powerhouse: four reversible pump-generators.

James A. FitzPatrick Nuclear Power Plant

Location: Scriba, on the south shore of Lake Ontario, Oswego County

Net Dependable Capability: 800,000 kw

First Commercial Power: July 1975

1989 Net Generation: 6.2 billion kwh

Net Generation Through 1989: 65.8 billion kwh

Principal Features:
Boiling water reactor weights 503 tons and uses 115 tons of uranium fuel. Reactor operates at a temperature of 545 degrees F. to produce 10.4 million pounds of steam an hour.

Turbine-generator uses steam from the reactor to rotate 1,800 times a minute to generate electricity at 24,000 volts.

Water from Lake Ontario is used to condense steam from the reactor back to water for reuse in the reactor. None of the lake water goes through the reactor. It is returned to the lake through an underwater fountain that limits the lake's surface temperature increase to less than three degrees F. above the existing temperature near the discharge point.

(26) ***Indian Point 3 Nuclear Power Plant***

Location: Buchanan, on the Hudson River, Westchester County

Net Dependable Capability: 965,000 kw

First Commercial Power: August 1976

1989 Net Generation: 5 billion kwh

Net Generation Through 1989: 59.3 billion kwh

Principal Features:
Pressurized water reactor weights 433 tons and holds 111 tons of uranium fuel. Reactor operates at a temperature of 547 degrees F. and pressure of 2,235 pounds a square inch. Steam generators transfer the heat to a separate system.

Turbine-generator uses steam from that system to rotate 1,800 times a minute to produce electricity at 22,000 volts.

Water from the Hudson River is used to condense steam back to water for reuse in the nonnuclear portions of the steam generators. The river water is returned to the Hudson in a manner that limits the river's surface temperature increase to four degrees F. above the existing temperature.

Charles Poletti Power Project

Location: New York City, on the East River

Net Dependable Capability: 825,000 kw

First Commercial Power March 1977

1989 Net Generation: 2.6 billion kwh

Net Generation Through 1989: 30.6 billion kwh

Principal Features:
Balanced-draft boiler, 175 feet high, modified to burn natural gas as well as oil. Boiler produces 6.6 million pounds of steam an hour to rotate the turbine-generator 3,600 times a minute. Oil-storage tank farm with 36-million-gallon capacity.

Ashokan Project

Location: Ashokan Reservoir, in Olive, Ulster County

Net Dependable Capability: 3,300 kw

First Commercial Power November 1982

1989 Net Generation: 20.4 million kwh

Net Generation Through 1989: 147.1 million kwh

Principal Features:
Underground powerhouse with two turbine-generators. A 240-foot-long penstock from the reservoir. Remote operations under jurisdiction of Blenheim-Gilboa project.

Kensico Project

Location: Kensico Reservoir, in Valhalla, Westchester County

Net Dependable Capability: 2,400 kw

First commercial Power: July 1983

1989 Net Generation: 18.7 million kwh

Net Generation Through 1989: 103 million kwh

Principal features:
Three turbine-generators installed below ground in the reservoir's lower effluent chamber. Remote operations under jurisdiction of Poletti project.

(27) NOTES TO FINANCIAL STATEMENTS

Note A—General

The Power Authority of the State of New York is a corporate municipal instrumentality and political subdivision of the State of New York created by the Legislature of the State by Chapter 772 of the Laws of 1931, as last amended by Chapter 469 of the laws of 1989.

Properties and income of the Authority are exempt from taxation. However, the Authority is authorized by Chapter 908 of the Laws of 1972 to enter into agreements to make payments in lieu of taxes with respect to property acquired for any project where such payments are based solely on the value of the real property without regard to any improvement thereon by the Authority and where no bonds to pay any costs of such project were issued prior to January 1, 1972.

Note B—Accounting Policies

(1) Accounts of the Authority are maintained in accordance with the Uniform system of Accounts prescribed by the Federal Energy Regulatory Commission (FERC).

(2) Utility plant is stated at original cost and consists primarily of amounts expended for labor, materials, services and indirect costs to license, construct, acquire, complete and place in operation the projects of the Authority. Interest on amounts borrowed to finance construction of the Authority's projects is charged to the respective project prior to completion thereof. Borrowed funds and internally generated funds restricted for a specific construction project are deposited in construction funds. Earnings on such fund investments must remain in the fund and may only be used for construction purposes. Earnings on unexpended borrowed funds are credited to the cost of the related project until completion of the project. Interest earned on internally generated funds is deferred and will ultimately reduce the cost of the related project. During 1989, $16,195,000 of interest income on internally generated construction funds was deferred. In periods prior to 1989, such deferred interest income reduced construction work in progress, but as of December 31, 1989, it is reported as a deferred credit on the Balance Sheet. Utility plant is reduced by revenues received for power produced (net of expenditures incurred in operating the projects) prior to the date of completion. The costs of current repairs are charged to operating expenses and renewals and betterments are capitalized. The

cost of utility plant retired and the cost of removal less salvage (exclusive of nuclear plant decommissioning costs) are charged to accumulated depreciation.

(3) Depreciation is provided on a straight-line basis over the estimated useful lives of the various classes of plant as determined by independent engineers and includes estimated cost of removal, net of estimated salvage value. The depreciation provision for 1989 expressed as a percent of average depreciable electric plant approximated 2.7% on an annual basis.

(4) the amortization of nuclear fuel is provided on a unit of production basis. Amortization rates are determined and periodically revised to amortize the cost of nuclear fuel over its estimated useful life. The costs of disposal of spent nuclear fuel will be met from provisions included in operating expenses (See Note F). In addition, the Authority is providing for the decommissioning of its nuclear plants over their estimated useful lives (See Note G (5)).

5) Deferred revenues represent certain billings, related to the recovery of costs, which have been deferred and will be amortized over the life of the applicable asset.

(6) Costs incurred by the Projects' Study Fund for preliminary investigations of a project are transferred to utility plant upon the specification of a project under the General Purpose Bond Resolution (See Note D). If the study does not result in a project, the costs are charged as an expense to net revenues in the period such determination is made.

(7) Unamortized debt discount and expense are amortized over the lives of the related debt issues on a straight-line basis.

(8) In accordance with the Resolution, upon completion, or the latest estimated date of completion, of each project, whichever is earlier, all revenues received from such project are required to be paid into the Revenue Fund.

(9) Funds required for all bond service payments due under the Resolution are payable on July 1 and January 1 and are made available to the Bond Trustee on the immediately pre-

ceding June 30 and December 31, by which dates such amounts are segregated for that purpose. Accordingly, at December 31, 1989 no liability is reflected in the accompanying financial statements for January 1, 1990 bond service payments of $167,599,000.

(10) Investment of the Authority's funds is administered in accordance with the applicable provisions of the General Purpose Bond Resolution and with the Authority's investment guidelines adopted pursuant to Section 2925 of the Public Authorities Law. These guidelines comply with the New York State Comptroller's investment guidelines for public authorities. The Authority's investments have been restricted to obligations of the U.S. Government, its agencies and instrumentalities, and to agreements for the repurchase of such obligations and to direct and general obligations of any state or political subdivision, provided that such obligations were rated in either of the two highest rating categories by two nationally recognized bond rating agencies. All investments are held by the Authority's designated custodian in the name of the Authority. Securities that are the subject of repurchase agreements must have a market value at least equal to the cost of the investment, and the agreements are limited to a maximum fixed term of five business days. At December 31, 1989 the Authority had investments in repurchase agreements of $48,160,000 and the aggregate cost of all investments in U.S. Government securities approximated market value based upon published bid prices. At December 31, 1989 the Balance Sheet reflects cash in the Restricted Funds, Construction Funds and in Current Assets of $1,361,000. The available bank balances were $12,918,000, of which $549,000 was covered by Federal depository insurance, $6,7000,000 was collateralized and $5,669,000 was uninsured. The uninsured balance

United States Exhibit J—(included in the Compilation of Declarations and Exhibits filed on October 26, 1990)—Low-Level Waste: A Program for Action, Final Report of the National Governor's Association Task Force on Low-Level Radioactive Waste Disposal (November, 1980) (excerpts).

LOW-LEVEL WASTE:
A PROGRAM FOR ACTION

Final Report
of the
National Governors' Association
Task Force on Low-Level Radioactive Waste Disposal

November 1980

Energy and Natural Resources Program
National Governors' Association
444 North Capitol Street, Washington, D.C.

This report was prepared by members of the National Governors' Association Task Force on Low-Level Radioactive Waste Disposal and by the staff of the NGA Energy and Natural Resources Program.

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Governor John V. Evans of Idaho and Governor Richard L. Thornburgh of Pennsylvania (Co-chairmen, NGA Subcommittee on Nuclear Power);

Governor James R. Thompson of Illinois (Chairman, NGA Committee on Transportation, Commerce and Technology);
Governor Robert List of Nevada and Governor Dixy Lee Ray of Washington (Co-chairman, NGA Subcommittee on Transportation of Hazardous Materials); and
Governor Richard W. Riley (Chairman, State Planning Council on Radioactive Waste Management).

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OVERVIEW

The National Governors' Association has in recent years actively promoted the concept of "cooperative federalism." The objective is to provide a more equitable division between federal and state roles in areas where states have the capacity and desire to assume responsibility. Low-level nuclear waste management is a field where the states and the federal government have shared responsibility since the inception of the Agreement States program in 1959. Though questions have arisen about some aspects of the program, over two decades of experience have demonstrated that states can and do possess the technical and administrative capacity to manage low-level nuclear waste disposal.

Last year's temporary closure of two of the nation's three commercial waste disposal sites dramatically highlighted the need to establish additional disposal facilities immediately. Those closures were precipitated by the consistent failure of waste generators to properly package and transport their waste and the subsequent failure of several state and federal agencies to adequately enforce waste packaging and transportation regulations and impose proper sanctions. The crisis created by the site closures also raised questions about the appropriate state and federal roles in securing additional capacity as soon as practicable. The prospect of a federally-imposed solution is one option. The Task Force, however, after assessing the problems and proposed alternatives, has concluded that a solution developed by the states is preferable and possible. A state solution recognizes that, in the final analysis, although certain federal involvement is required, the siting of a low-level nuclear waste facility involves primarily state and local issues which are best resolved at the governmental level closest to those affected.

Unlike many problems confronting the nation, the issue of low-level waste does not, in the view of the Task Force, present insurmountable technical or political obstacles. We do not underestimate the challenge involved in siting additional low-level waste facilities, but it has been demonstrated that safe, long-term disposal technology does presently exist and that through proper incentives and public education, increased adequate disposal capacity can be developed. The Task Force is encouraged that the findings of other groups studying the problem are in accord with those of the Task Force.

The relative unanimity of opinion among groups such as the NGA Task Force, the State Planning Council and the U.S. Department of Energy's Low-Level Waste Strategy Task Force, indicates that implementation of a regional strategy leading to the creation of regional sites is the major task remaining to resolve the low-level waste problem.

THE ISSUE

In July of 1979, the Governors of Nevada, South Carolina, and Washington, the states hosting the nation's only operating commercial low-level waste disposal sites, became concerned about the threat to public health and welfare posed by improper packaging and unsafe vehicles. They demanded that the Nuclear Regulatory Commission and the Department of Transportation enforce waste packaging and transportation regulations. Despite assurances from these agencies, the State of Washington found further violations of the regulations. Governor Ray closed the Hanford facility on October 4. On October 23, Governor List closed the Beatty, Nevada site after a U.S. Geological Survey team uncovered waste buried outside the existing fence—demonstrating inadequate record-keeping for past operations at the site.

The sites were eventually reopened, following promises of certain corrective actions, but the three Governors of the repository states clearly and forcefully wanted their unwillingness to continue to shoulder the entire national burden for low-level waste. They emphasized the necessity for other states to share in that responsibility. In addition, the citizens of repository states have for years borne the health and monetary costs of defective packaging and faulty vehicles. Moreover, some low-level waste is shipped from New England to Hanford, Washington causing excessive transportation costs and threatening unnecessary exposure to residents along the shipping route. The Governors' pronouncement, coupled with the diminishing physical capacity of those sites, compels immediate action.

Low-level wastes are defined as all radioactive wastes except spent fuel, high-level wastes which result from reprocessing of spent fuel, uranium mill tailings or wastes which contain more than ten nanocuries of transuranic contaminants per gram of material. They are generated by a wide variety of government, commercial, and medical sources. Federal generators of low-level include defense and research facilities.

The preponderence of commercial low-level waste is contaminated paper, plastics, rubble, filters, construction material, tools, and protective clothing from nuclear power plants. The growing use of radioactive materials in such products as luminous watch dials, measurement devices and smoke alarms has added to the volume of industrial waste. Finally, during the past two decades the medical profession and the academic community have increased their use of radioactive materials in research and diagnosis. Nearly 100 million diagnostic applications of radioactive isotopes are performed annually.

Excluding federal government sources, between 75,000 and 100,000 cubic meters of commercial low-level waste are generated each year. Nearly half comes from power plants, with almost a quarter from industry and the final quarter from medical and research institutions. A failure to expand low-level nuclear waste capacity can have serious adverse effects on our national energy program and our national health care system.

Low-level radioactive waste management may rapidly become crisis management if states continue to delay development of new disposal sites and techniques. National inaction regarding the creation of additional disposal capacity and techniques threatens to halt or seriously curtail medical research and diagnostic activities critical to the public health and welfare. Every community in this nation will be affected if it becomes more difficult to reap the benefits of nuclear medicine. The timetable associated with providing additional sites is a critical factor.

Until recently, Barnwell accepted low-level waste without restriction, annually receiving in excess of 75% of the nation's commercial wastes. However, since mid-1978, South Carolina has limited waste receipts at the Barnwell site to 2.4 million cubic feet per year. On October 31, 1979, Governor Riley announced a phased schedule to further reduce that limit to 1.2 million cubic feet within two years. Because it is geologically unacceptable, South Carolina also prohibits the burial of organic chemical wastes which comprise a large fraction of the wastes generated by hospitals, medical schools and universities. South Carolina has also refused to accept any waste from certain generators with poor packaging or shipping records.

Based on projected increases in the volume of low-level waste produced in this country and the restrictions on acceptance by current repository states, DOE estimates that a total of at least six low-level waste disposal sites could be required by the year 1990 in accordance with the following schedule:

1980	Barnwell, Beatty and Hanford can handle the nation's low-level waste
1982*	Hanford could be closed as a national disposal site and a new site in addition to Barnwell and Beatty is required
1984	Beatty is filled to capacity and a second new site is required
1986	Only Barnwell remains open, three new sites are required
1988	Barnwell is still open, but the national generation rate requires four additional sites
1990**	Barnwell *and five additional sites are required*

There are several other compelling facts:

—Projections from past trends indicate that the nation will generate 321,000 cubic meters of low-level waste by

*Policy issues, not physical limitations, are the more immediate factors controlling the future of the Hanford site. Governor Ray has threatened a 1982 closure of the Hanford site as a national repository (except for medical wastes) unless some meaningful progress occurs toward region formation. The mood of the state on this issue is further evidenced by a recent unsuccessful effort by the Washington State Legislature to codify Governor Ray's position, and a subsequent state initiative drive to accomplish the same. However, the actual physical capacity of the present Hanford site is not projected to be exhausted until approximately 1990, with the potential for future site expansion.

**In the absence of *any* restrictions or other complicating factors relating to these three sites, it is possible, but not probable, that all three sites could remain open until 1990. However, it is already questionable as to whether the Beatty site can expand on surrounding federal lands, and Barnwell has already adopted a phased volume-reduction schedule.

1990 as compared to approximately 99,000 cubic meters in 1980.

—DOE estimates that, with a total of six low-level waste disposal sites which may be required by the year 1990, by dividing the nation into five regions, no region would require more than 1-1/3 sites comparable to Barnwell's capacity.

—The U.S. Department of Energy estimates that without additional sites we could experience severe disposal problems by mid-1983.

—The Nuclear Regulatory Commission estimates that, even beginning immediately, complete development of a new site would take from two to four years.

In summary, the severity of the problem requires that additional waste disposal capacity be developed as soon as possible. To accomplish that, the Task Force urges the National Governors' Association to adopt the recommendations outlined below.

RECOMMENDATIONS

Regionalization

The most fundamental fact is that we do not need 50 separate state sites. Instead, there is a need for up to six to eight well-regulated and economically viable regional sites. The difficult problem is how to rapidly develop a *process* to first define the most appropriate multi-state regions.

Unlike high level waste, which is primarily a federal responsibility, the disposition of low-level waste should be largely a state responsibility. In that respect, a regional solu-

tion, where disposal sites would be determined by groups of states negotiating cooperatively, is the Task Force's preferred approach. Regionalization, as prescribed by states, is mandated by such considerations as costs, risk in transport, regional balance and geologic or hydrologic circumstances which may render some states unsuitable for such sites.

Recommendation 1:

EACH STATE SHOULD ACCEPT PRIMARY RESPONSIBILITY FOR THE SAFE DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE GENERATED WITHIN ITS BORDERS, EXCEPT FOR WASTE GENERATED AT FEDERAL GOVERNMENT FACILITIES. WHILE EACH STATE IS FREE TO ESTABLISH ITS OWN SITE, THE STATES SHOULD PURSUE A REGIONAL APPROACH TO THE LOW-LEVEL WASTE DISPOSAL PROBLEM.

Since low-level waste is generated in every state, it is unfair to expect three states to shoulder the sole responsibility for the safe disposal of the entire nation's waste. Unlike high level waste, the problem is not so technologically complex that it requires the leadership of the federal government to manage it effectively. Because the states are primarily charged with protecting their citizens' health, safety, and environment, it is appropriate that they assume this responsibility. In addition, the public is more likely to accept siting and other waste management decisions made by state government than by a more remote, less accessible federal agency.

A regional approach is preferred because, with the exception of a few of the biggest waste-generating states, the volume of waste generated in a single state is too small to make a disposal site economical, i.e., to produce revenues sufficient

for its operation and maintenance. In addition, effective waste management requires coordination of regulation throughout the waste cycle—from generation through transportation and processing to ultimate disposal. Despite the best efforts of the disposal site state, improper handling of the waste at any point along the way can defeat the goal of safe disposal.

Regionalization is required by the diminishing capacity of current disposal sites. But even if the existing sites could continue to handle the entire national output of low-level waste, increasing transportation costs would favor establishing disposal facilities nearer to the waste generators and transportation risks are greater the longer the waste must travel.

Recommendation 2:

IN ORDER TO FACILITATE THE ESTABLISHMENT OF NEW DISPOSAL SITES, CONGRESS SHOULD AUTHORIZE THE STATES TO ENTER INTO INTERSTATE COMPACTS TO ESTABLISH REGIONAL DISPOSAL SITES. SUCH AUTHORIZATION SHOULD INCLUDE THE POWER TO EXCLUDE WASTE GENERATED OUTSIDE THE REGION FROM THE REGIONAL DISPOSAL SITE.

While the states should take primary responsibility for resolving low-level waste issues, they need the help of Congress to remove two obstacles in their path. First, the states should be given advance generic consent to form interstate compacts or other agreements in this subject area. Interstate compacts may be preferable to less formal modes of agreements between states because, as a binding contractual agreement, they provide the continuity of a stable framework which can endure from siting and licensing through decommissioning of a disposal site.

The Compact Clause of the U.S. Constitution requires either advance Congressional consent or subsequent ratification of a compact before it can take effect. By granting advance generic consent, Congress would facilitate the formation of regional low-level waste compacts by the states. Advance consent will also avoid the delay which would result if each individual compact had to be submitted to Congress for ratification following negotiation among the states.

Congress should also empower the states to exclude waste generated outside the region from their regional site. Recent court decisions indicate that, absent Congressional authorization, such a ban may be illegal. Without the authority to ban out-of-region waste many states may find it politically difficult to join a new regional waste compact.

Not only would this exclusivity power make it more attractive to form regional waste compacts in the first place, but as regions adopt such provisions the pressure will increase on those states which have not yet acted. (See Appendix I.)

In addition to compact authorization and exclusivity, the federal government should, at the same time, specify a strict policy for interim storage of low-level waste. Federal legislation should be considered to allow use of DOE sites only for temporary storage of low-level waste, and the storage fee should be commensurate with the disposal fee required by the operating sites. This would avoid the prospect of DOE sites becoming a permanent disposal alternative for those states failing to participate in a regional compact or develop their own site.

Two alternative approaches to Recommendation 2 were addressed by the Task Force with the following results:

Alternative 2A	Congress should require states to form regional compacts for low-level waste without mention of specific sanctions.
Alternative 2B	Congress should require states to form regional compacts and impose sanctions (similar to pending Congressional legislation) for states which fail to form compacts or establish their own sites.

Many of the compact-authorization bills drafted so far have coupled Congressional consent with sanctions for failure by the states to act. For example, the Udall bill (H.R. 6390) and the Lujan bill (H.R. 6212) would cancel NRC licenses in states which have failed to act. A draft bill was submitted by DOE for consideration by the State Planning Council. It would ban interstate low-level waste shipments unless made pursuant to a regional compact. The Task Force feels that such coercive measures are unnecessary at this time.

If the strategy for region-formation suggested below is followed, most of the states can be grouped into waste disposal regions in the near future. If the new regions opt to exclude out-of-region wastes, then pressure will naturally build on the remaining states to devise their own regional or in-state disposal solutions. In this manner, pressure will come from the states themselves rather than from federal coercion. This process is viewed as being more consistent with the principle of state responsibility in this subject area than federal coercion would be.

Therefore, the Task Force would recommend that Congress defer consideration of sanctions to compel the establishment of new disposal sites until at least two years after the enactment of compact consent legislation. States are already confronting the diminishing capacity of present sites and an

unequivocal political warning from those states' Governors. If at the end of the two-year period states have not responded effectively, or if problems still exist, stronger federal action may be necessary. But until that time, Congress should confine its role to removing obstacles and allow the states a reasonable chance to solve the problem themselves.

Region Formation—A Strategy

The first challenge the states face in devising a regional solution is determining the regional boundaries. The location of the three existing disposal sites suggests a good starting point. Waste generation rates and transportation considerations should be taken into account in the formation of regions for new disposal sites. But in the final analysis region-formation is a political question which will be influenced by considerations such as historic and geographic ties among the states and the track record they have established for cooperation in other areas of mutual concern.

In devising a rational and orderly strategy for region formation, the Task Force was guided by the following premises:

1. Region-formation should be accomplished by the states, rather than imposed on them by the federal government.

2. Initiatives by groups of states which are already exploring the potential for regional cooperation should be encouraged. (Such initiatives have developed in the Midwest and the Northeast.)

3. The strategy should minimize the risk that individual states would end up isolated from a surrounding region.

In addition, the Task Force makes the following assumptions:

1. The three disposal sites currently operating will likely become regional sites.

2. The Midwest and the Northeast are the most logical areas for the establishment of the first new regional disposal sites both because they are more remote from the current sites, and they include some of the highest volume-generating states.

The Task Force has noted a general reluctance by some states to devise a regional program which actually specifies what states are within what regions.

The Task Force has attempted to tackle this tough issue with a proposal for an initial course of action along the following recommended guidelines:

Recommendation 3:

A TOTAL OF SIX REGIONAL CONFERENCES SHOULD BE ORGANIZED AS SOON AS POSSIBLE TO DISCUSS THE NEED FOR ADDITIONAL DISPOSAL SITES AND THE OPTIONS FOR REGIONAL FACILITIES. THE GOVERNORS OF STATES WITH OPERATING SITES SHOULD CONVENE A CONFERENCE ON REGION-FORMATION FOR THE STATES IN THEIR GENERAL AREA. ALSO, THE NATIONAL GOVERNORS' ASSOCIATION, IN COOPERATION WITH THE NATIONAL CONFERENCE OF STATE LEGISLATURES AND THE STATE PLANNING COUNCIL, SHOULD CONVENE CONFERENCES ON REGION-FORMATION IN THE REGIONS WHICH DO NOT CONTAIN

OPERATING DISPOSAL SITES. ALTHOUGH PARTICIPATION IN EACH CONFERENCE SHOULD BE OPEN TO ANY STATE, THE FOLLOWING IS A *SUGGESTED* FORMAT:

Southeast Regional Conference
- *South Carolina
- North Carolina
- Georgia
- Florida
- Alabama
- Tennessee

Southwest Regional Conference
- *Nevada
- California
- Arizona
- New Mexico
- Colorado
- Utah

South Central Regional Conference
- Texas
- Louisiana
- Mississippi
- Arkansas
- Missouri

Midwest Regional Conference
- Illinois
- Indiana
- Ohio
- Michigan
- Wisconsin
- Minnesota
- Iowa

Northwest Regional Conference
- *Washington
- Alaska
- Idaho
- Montana
- Oregon
- Wyoming

Northeast Regional Conference
- Maine
- New Hampshire
- Vermont
- Massachusetts
- Rhode Island
- Connecticut
- New York
- New Jersey
- Pennsylvania

*The present repository states.

It should be noted that this format merely represents an initial attempt to suggest some natural groupings of states, based on their geographic proximity or previous cooperative efforts and agreements. For instance, states suggested in the Southwest and Northwest Regional Conferences have some historic ties as members of the Western Interstate Energy Board. Similarly, the states grouped in the South Central and Southeast Regional Conferences are among the states which

comprise the Southern States Energy Board. States listed below, not included in any of the above groups, should participate in their choice of one or more of the six conferences:

- Hawaii
- North Dakota
- Nebraska
- Kansas
- Oklahoma
- District of Columbia
- Kentucky
- Virginia
- West Virginia
- Maryland
- Delaware
- South Dakota

Other Alternatives

The Task Force considered the following alternatives to the above strategy:

Alternative 3A — Allow the states to continue to negotiate regional compacts on an ad hoc basis.

Alternative 3B — Request the federal government (Congress or DOE) to devise regions.

Alternative 3C — Have the states (through the NGA or other state association) convene a national conference on region-formation.

Alternative 3A was rejected because many states have not yet become involved in any discussions leading toward a regional solution to the low-level waste problem. The Task Force placed a high priority on the early involvement of *all* states in this process. In addition, forming regions on an ad hoc basis poses a real danger of leaving some individual states isolated from surrounding closed regions.

Alternative 3B was rejected because it violates the first premise on which the Task Force proceeded. While federal

imposition may become necessary if the states fail to take timely action, it should be the last resort.

Alternative 3C was rejected because it was felt it would be extremely difficult, if not impossible, to achieve consensus among all fifty states on a particular regional scheme.

Other Regionalization Recommendations

Recommendation 4:

> A COMPACT FORMED BY ANY REGIONAL GROUP OF STATES SHOULD CONTAIN A PROVISION FOR SUBSEQUENT ADMISSION OF NEW MEMBER STATES AND A MECHANISM TO ENABLE TEMPORARY OR EMERGENCY CONTRACTUAL ARRANGEMENTS WITH NON-REGION STATES OR INDIVIDUAL GENERATORS.

This would prevent a region's ability to exclude other states from becoming oppressive. Temporary arrangements would give time to states outside of compacts to develop their own compact or in-state site.

Recommendation 5:

> THE U.S. DEPARTMENT OF ENERGY AND ALL OTHER APPROPRIATE FEDERAL AGENCIES SHOULD PROVIDE TECHNICAL ASSISTANCE TO EACH OF THE REGIONAL CONFERENCES. THIS SHOULD INCLUDE INFORMATION ON WASTE GENERATION, SITE CHARACTERISTICS AND TRANSPORTATION CONSIDERATIONS, AND OTHER RELEVANT

> INFORMATION, IN ORDER THAT THE CONFERENCE CAN MAKE A PRACTICAL DETERMINATION ON REGION-FORMATION.

THE SITING PROCESS

Once the states have begun to form regions, the next major decision concerns the process which must be followed in order to develop an appropriate site within the region. Similar to the determination of regions, the siting process will be largely a political one. It will inevitably entail a mixture of state legislative and executive actions.

Consequently, it would be difficult and unwise to presuppose a uniform siting process. The details of the siting process and the individual state's commitments to the binding nature of the selection procedures should be negotiated as a provision of the compact.

A crucial issue here is public acceptance and the means by which the host state can maximize public acceptance. To help assure that support, the siting process must be scrupulously equitable for each state, and the public must know that its state will make the final decision. The whole issue of incentives discussed later, should also help to enhance public acceptance.

Accordingly, the Task Force suggests the following recommendations, alternatives, and other compact considerations with respect to the siting process.

Recommendation 6:

> NGA RECOGNIZES THE POLITICAL, TECHNICAL AND ECONOMIC VARIABLES INVOLVED IN EACH REGIONAL PROCESS. THEREFORE, IT URGES THAT THE SPECIFICS OF EACH

REGION'S SITING PROCESS BE DETERMINED AS PART OF COMPACT OR AGREEMENT NEGOTIATIONS BY THAT REGIONAL GROUP OF STATES. HOWEVER, TO INSURE THAT THE SITING PROCESS INCLUDES A MAXIMUM AMOUNT OF LOCAL INPUT, EACH STATE WITHIN A REGION SHOULD CREATE ITS OWN STATE REVIEW COMMITTEE TO ACT IN AN ADVISORY ROLE TO ITS OWN EXECUTIVE AND LEGISLATIVE BRANCHES AND TO THE REGIONAL NEGOTIATORS. SUCH COMMITTEES SHOULD INCLUDE STATE, LOCAL AND TRIBAL OFFICIALS AND TECHNICAL EXPERTS APPOINTED BY THE GOVERNOR.

Such State Review Committees should play a central role in conjunction with technical assistance provided by the federal government in developing the blueprint for the siting criteria. These committees will help to offset existing credibility gaps between states and the assisting federal agencies. State Review Committees can provide ongoing cooperation and independent analysis of siting recommendations. State Committees will also begin to involve local, state and tribal officials early in the dicision making stages of the siting process—a critical feature to later obtaining public acceptance in the site state. The specifics of this process are outlined below.

Steps toward compact formation

Typical compact provisions include: statement of purpose or policy, composition of a governing board, voting rights and financing provisions (see Appendix III). The basic steps toward compact formation include:

1. *Region-formation*

The region-formation strategy should yield at least nucleus of states within each of the six general regions. Those states which have reached tentative agreement to explore the possibility of forming a region can then proceed to more detailed negotiations. As they do so, they should try to keep the process open to additional states which may wish to join the region.

2. *Negotiations*

One consideration at this stage is who will negotiate for the state. The governor will in all likelihood appoint the negotiator(s). Since the final product will require legislative approval, a serious effort should be made to involve legislative leaders in the process from the beginning.

3. *Execution*

Once the party states have agreed on all the terms, a written agreement will be executed. Initial agreement could be expressed in one of two ways. The governors of each state could exchange reciprocal executive orders embodying the agreement. Or, if all of the party states belong to either the Western Interstate Energy Board or the Southern State Energy Board, the agreement could be executed as a "Supplemental Agreement" under the terms of the W.I.E.B. or S.S.E.B. compacts. However, either supplemental agreements or executive orders should be viewed as *interim* arrangements only (see Appendix I for more detailed discussion). Ultimately the agreement should be submitted to the legislature of each party state for enactment as a formal interstate compact. Though less formal agreements may serve as a basis for interstate cooperation, pending legislative enactment and the passage of Congressional consent legislation, it is only through legislative enactment by each state that the compact becomes a contrac-

tual obligation, legally binding on all the parties. Also, legislative enactment probably would tend to promote greater public acceptance of the proposal.

Site Selection Mechanics

While the various regions will want to adopt site selection procedures which are tailored to their own needs, the Task Force recommends the approach outlined below as one practical solution, with several alternative approaches also suggested. It is important to note that the policy and political decision-making process recommended below is in no way meant to be in lieu of environmental impact statements or any other environmental requirements.

1. Each state in the region should be encouraged to form a State Review Committee, composed of state, local and tribal officials, and technical experts. The State Review Committee would make an initial characterization of potential sites within the state with federal technical assistance as requested. As mentioned, this process would involve local, state and tribal officials early in the decision-making stages of the siting process—a critical feature to later obtaining public acceptance in a site state. Each State Review Committee would be encouraged to forward two or more site candidates to the Regional Review Committee.

2. The Regional Review Committee would be comprised of the Chairpersons of each State Review Committee in the region. The Regional Review Committee would narrow the number of candidate sites and make a more detailed characterization of each.

3. Final site selection would be made by the governing board of the compact. The Board would select a site from the

list of candidate sites submitted by the Regional Review Committee.

In addition, consideration should be given to formation of a national review board, comprised of members from each region. That board could negotiate from a national perspective—other potential tradeoffs among states or regions. The board could among other things, facilitate agreements whereby regions exchange different forms of low-level waste.

The Task Force considered, but ultimately rejected, the following as possible alternative approaches to the site selection mechanics:

Alternative 6A Allow DOE and USGS to recommend three suitable sites within each region or devise site selection criteria.

Alternative 6B Request NGS (or other state association) to devise a site selection process.

Host State Rights

The Task Force recommends the following approach to the controversial issue of veto action by a state selected as a regional site:

Recommendation 7:

A STATE WHICH IS ULTIMATELY SELECTED AS A REGIONAL SITE CAN EXERCISE A VETO, BUT AS A PENALTY THAT STATE COULD BE REQUIRED TO DROP OUT OF THAT COMPACT

An inevitable question is whether a state chosen to host a regional site should ultimately have veto power. Realistically, states would have a difficult time relinquishing all veto power.

In accordance with the site selection mechanics, a potential site state would have an opportunity to make its case for or against a proposed site to the Regional Review Committee and to the Board. If, despite all the evidence and argument presented by the site state, the Board ultimately selects that site over the site state's objection, the question of veto rights arises. Even if a site state veto is expressly disallowed by the terms of the compact, a *de facto* veto would likely result if the site state simply refuses to cooperate.

Therefore, the Task Force recommends that the site state be given the right to veto the Board's final decision, but the Board should have the authority to impose sanctions, including expulsion from the compact, if a veto is exercised. By expressly allowing a veto, some states' reluctance to enter a regional compact may be minimized. But significant sanctions should discourage unreasonable vetoes. If the vetoing state is denied access to the regional site it will have to either find another region which will accept its waste, or make its own arrangements in-state. The former would be very difficult, and the latter would likely be economically unattractive. In addition, the vetoing state will probably confront the same political problems in developing an in-state site which it encountered in the regional siting process.

In summary, site-selection procedures should be spelled out in all regional compacts. Even if the region contains an operating disposal site (or if one of the states in the region has offered to host a new regional site) the region may need additional disposal sites in the future. Also, the compact may become involved in siting other low-level waste management facilities, such as a waste processing plant. Or the compact

may become involved in siting hazardous waste facilities in one state as an incentive to the acceptance of a low-level waste facility in another state.

INCENTIVES AND BENEFITS

Expeditious development of regional low-level nuclear waste facilities will likely depend on the quality and quantity of incentives and benefits available to state and local units of government. The concept of *incentives* recognizes the need to encourage and motivate the states and local communities to accept location of a low-level nuclear waste disposal facility. For example, the availability of funds to be used at the discretion of site states and site communities, would act as a positive inducement toward locating a site. On the other hand, the concept of *benefits* acknowledges the need to provide some type of rightful compensation or commitment for specific needs of or effects on a state and community as a result of their acceptance of such a regional facility. For instance, such benefits could include financial commitments to the site state and community and substantial Perpetual Care and Decommissioning Funds to be provided by waste generators agreed to as a condition of their licensing.

Successful efforts to encourage public acceptance of a site must provide incentives and benefits to those affected by the presence of a regional site. Accordingly, two distinct parties need to be benefited: (1) the local community hosting the waste facility; and (2) the site state. These two parties should receive some kind of incentive and benefit to be provided by the federal government and the generating states within the region. Various state and federal legislative action should be encouraged to achieve that purpose.

To date, federal legislation has taken a negative approach in attempting to force state action on the disposal issue. The Task

Force prefers the carrot to the stick and believes that sanctions should be a last resort, only instituted if constructive programs fail to accomplish state action.

The degree to which incentives and benefits are utilized to facilitate local acceptance of a site will depend in part on the success of public education programs. Such programs can minimize the overall need for such incentives or benefits by increasing public awareness regarding the actual low risk associated with such sites. This is especially true given the general public's lack of understanding about the nature of low-level radioactivity.

Consequently, the most effective methods of achieving public acceptance in locating such a facility are to provide for public participation, public education and some form of financial incentive or benefit to the regional site state and community. State, federal and private interests must jointly share the responsibility for accomplishing these educational and economic purposes. Here the concept of "cooperative federalism," so deeply imbedded in our country's history, will face one of its more rigorous tests.

The Task Force offers the following recommendations on the question of incentives and benefits and encourages reference to Appendix II for a more complete discussion of these issues:

Recommendation 8:

> CONGRESS SHOULD CREATE A SPECIAL DISCRETIONARY FUND WHICH WOULD CONFER COMPENSATORY AND FINANCIAL BENEFITS TO SITE STATES AND SITE COMMUNITIES TO ACCOMPLISH AT LEAST THREE MAJOR PURPOSES: (1) TO COMPENSATE FOR SIGNIFICANT

> EFFECTS TO THE INFRASTRUCTURE OF THE COMMUNITY HOSTING A LOW-LEVEL NUCLEAR WASTE FACILITY, (2) TO PROVIDE EFFECTIVE INDUCEMENTS TO DEVELOP REGIONAL LOW-LEVEL NUCLEAR FACILITIES, AND (3) TO PROMOTE PUBLIC ACCEPTANCE OF LOW-LEVEL NUCLEAR WASTE DISPOSAL SITES.
>
> ADDITIONAL INCENTIVES COULD INCLUDE CERTAIN REGULATORY AND ENFORCEMENT AGREEMENTS AMONG THE GENERATING STATES AND A SYSTEM OF "BONUS" REVENUES TO THE SITE COMMUNITY, PART OF WHICH COULD INCLUDE STATE TAXES ASSESSED AGAINST GENERATORS OR SOME FORM OF COMPENSATION AGREED UPON AMONG THE GENERATING STATES.

The following is a suggested approach to Recommendation 8:

1. *The Federal Role:* Federal incentives must include funds to states for preliminary technical assistance and site characterization *and* a special fund consisting of discretionary grants awarded to states hosting a new regional site. The use of such grant monies would be left to the site states and site communities to decide, although eligibility for such funds could be tied to a regional agreement to establish a waste tracking system or agreement to establish a regional volume reduction policy. The discretionary grant appropriation would revert to the U.S. Treasury at a date certain as a further incentive to promote a quick state-regional response.

2. *The State Role:* Incentives to the site state and site community should include two basic approaches:

—Generating states in the region should provide some combination of economic, regulatory and enforcement commitments to the site state, and

—The site state should require economic incentives be available to any local community or county where the regional site is located.

Generating states should form strict agreements, as part of the terms of a compact, that they will at least:

—Take enforcement action against waste generators in their state on notice of violations.

—Provide inspections of packaging operations prior to shipment to avoid the unsafe transport of low-level wastes.

—Develop policies on transportation routing and notification of shipment.

As a condition of licensing, the site state could require payment of a "bonus" amount from all generators in the region. That revenue would accrue to the site community for its own selected use. A fair compensation sum would be determined by the local government, industry and the states.

3. *Industry's Role:* It is reasonable to assume that the private sector will assume the capitalization costs for regional sites provided there is enough anticipated waste volume to guarantee a profitable operation. Accordingly, industry must be involved in the early stages of development of regional sites to help determine if the volume generated within the proposed region is sufficient to guarantee future profits and thus induce their front-end investment. Operators of the Barnwell site have estimated capitalization costs for a site to be between $6 and $10 million, from initial licensing to completed construction.

The overall pricing system must insure profitability, but at the same time generators must help to provide part of the additional funding for incentives and benefits to the state and local community hosting the site. Generators of the waste should be obligated to pay the previously mentioned "bonus" dollars to local communities, and they should also be required to contribute to the site state's Perpetual Care and Decommissioning Funds.

Recommendations 9:

FEDERAL FUNDS MUST BE MADE AVAILABLE FOR SITE CHARACTERIZATION STUDIES, PLANNING GRANTS, AND OTHER TECHNICAL ASSISTANCE FOR STATES TO DEVELOP REGIONAL SITES. SUCH FUNDING SHOULD BE MADE AVAILABLE IN A MANNER TO ENCOURAGE DEVELOPMENT OF REGIONAL SITES.

Part of the federal role must be to offer available resources only to states engaged in preliminary activities required to develop regional sites. At a minimum, the Nuclear Regulatory Commission, the U.S. Environmental Protection Agency, the U.S. Geological Survey, the U.S. Department of Energy and the Department of Transportation must be available for all reasonable technical assistance requested by such states. Critical to establishing productive state-federal relationships throughout the process will be the state's ability to acquire independent capability to assess their waste disposal problems.

Recommendation 10:

AS A TERM OF THE COMPACT, THE GENERATING STATES SHOULD PROVIDE THE SITE STATE ADEQUATE INCENTIVES. THESE

INCENTIVES, TO BE NEGOTIATED BY THE PARTICIPATING STATES, COULD INCLUDE BINDING COMMITMENTS FOR IMPROVED REGULATORY ENFORCEMENT AND AGREEMENTS AMONG STATES TO EXCHANGE DIFFERENT WASTES OR TO NEGOTIATE SPECIFIC EXCHANGES BASED ON ECONOMIC OR OTHER NEEDS OF STATES WITHIN A REGION.

Specific commitments to site states from generating states could include (see Appendix II for more detailed discussion):

—Negotiating tradeoffs among states, such as one or more states agreeing to develop hazardous waste sites or a low-level waste processing facility in exchange for use of a low-level disposal site in another state. For example, the State Commerce Departments in Oregon and Washington negotiated such an exchange agreement in the mid-1960's. Oregon accepts toxic chemical waste from the State of Washington and sends its low-level waste to the Hanford disposal site.

—Requiring strict enforcement or immediate action against the waste generators upon notification by the site state of violations committed by the shipper of a generating state.

—Providing for vigorous enforcement of strict packaging and transportation regulations.

It should be noted that federal rule making is currently underway to improve transportation safety and licensing procedures regarding low-level waste. The U.S. Department of Transportation has proposed "Radioactive Materials Highway Routing Regulations." The proposed new requirements would provide national uniformity in highway routing, a notification

system to states and a data bank for future emergency response planning. Similarly, the U.S. Nuclear Regulatory Commission has issued a preliminary draft of its regulations (10 C.F.R. Part 61) relating to licensing of low-level waste disposal sites. Although the proposed regulation will not be published for written comment in the *Federal Register* until early 1981, currently NRC is holding regional workshops to receive critiques on the draft.

RESEARCH

Ongoing, vigorous and comprehensive research programs are necessary in the management of low-level radioactive waste to assure that existing and future low-level waste disposal sites can meet all applicable criteria and standards to protect public health and safety using the best available technology. In addition, such programs can serve to enhance confidence in the methods used to manage these wastes.

Although the techniques used in the management of low-level waste have improved since 1962 when the first commercial low-level waste disposal site was licensed, the basic technology has seen little change. Recently, due primarily to the rapidly increasing costs for disposal, the incentives to develop new technologies have increased, especially in the area of waste treatment and volume reduction. This has prompted the commercial sector to increase its research and development efforts in these particular areas.

The Department of Energy is currently conducting research to improve the management of low-level waste. The Nuclear Regulatory Commission and the Environmental Protection Agency both have ongoing research and assessment programs in support of their development of standards for low-level waste management. These federal efforts include all aspects of radioactive waste management, from generation to final disposal.

While these ongoing efforts are acknowledged, it is felt that programs aimed at managing low-level wastes can be better enhanced if priority research attention is given to the areas recommended below.

Recommendation 11:

A SIMPLE CLASSIFICATION SYSTEM FOR LOW-LEVEL WASTE IS URGENTLY NEEDED. THE NUCLEAR REGULATORY COMMISSION MUST DEVELOP A SYSTEM BASED ON THE TOTAL HAZARD WHICH INCLUDES AN UPPER AND LOWER CONCENTRATION LIMIT.

Low-level waste is currently defined in the regulations as all radioactive waste which is not defined as high-level waste. This is a totally inadequate definition because certain low-level waste may be considered to be below a threshold concentration and therefore could be disposed of as ordinary trash with insignificant impact, while other low-level waste may be above a concentration that would make it unacceptable for shallow land burial.

Recommendation 12:

THE NRC MUST ESTABLISH IMPROVED GUIDELINES CONCERNING GENERATION AND TREATMENT METHODS FOR LOW-LEVEL WASTE. A VOLUME REDUCTION POLICY FOR ALL COMMERCIAL GENERATORS OF RADIOACTIVE WASTE MUST BE ESTABLISHED THAT ADDRESSES BOTH ADMINISTRATIVE AND TECHNOLOGICAL METHODS

THAT HAVE BEEN PROVEN AS VIABLE ALTERNATIVES. THIS POLICY SHOULD APPLY TO AGREEMENT STATES AS WELL.

Because of the lack of classification system for low-level waste and the somewhat inadequate regulations concerning generation and treatment, many forms of low-level waste are currently treated and disposed of by methods which are in many cases less than desirable. The NRC policies should include:

1. Continuing research into ways to reduce at the source the total volume of radioactive waste generated through such techniques as substituting non-radioactive substances for radioactive ones and substituting short-lived nuclides for longer-lived ones.

2. Improved methods of segregating and identifying waste at the source, thus eliminating that segment of trash that is currently deemed radioactive by association.

3. Improved methods of volume reduction for certain types of waste such as: (a) controlled incineration for combustible trash and scintillation fluids; or (b) advanced methods of treatment such as calcination for other types of low-level nuclear waste streams.

4. Improving the characteristic of the final low-level waste product by developing better solidification media, improved containers or a combination of both.

Recommendation 13:

A COMPREHENSIVE ENVIRONMENTAL MONITORING PROGRAM IS ESSENTIAL TO DETERMINE HOW EFFECTIVE THE TREATMENT AND DISPOSAL CONSIDERATIONS HAVE BEEN.

Continuing research is necessary to insure that equipment and techniques for environmental monitoring are optimized to detect and isolate possible migration of radioactive material for a low-level waste site both during the operational period and after decommissioning.

OTHER RECOMMENDATIONS

Recommendation 14:

AS A TOP PRIORITY, THE NUCLEAR REGULATORY COMMISSION AND THE DEPARTMENT OF TRANSPORTATION SHOULD DEVELOP A COMPREHENSIVE AND COORDINATE INSPECTION AND ENFORCEMENT PROGRAM TO INSURE STRICT COMPLIANCE WITH PACKAGING AND TRANSPORTATION REGULATIONS.

Since the closure of the two western sites, due mainly to sloppy waste shipments, NRC and DOT have made a more serious effort to improve their policies in these areas. Prior to that, according to a recent report issued by the U.S. General Accounting Office, the agencies gave a low priority to enforcement, relying mainly on the integrity of shippers and carriers to comply with the regulations governing the safety of radioactive materials' transportation. The GAO report concludes that much of their work remains fragmented and in need of improvement. For instance, neither NRC nor the Department has done an independent assessment of the scope of the packaging and transportation problems.

DOT is currently involved in rulemaking on Highway Routing of Radioactive Materials (Docket HM-164) which includes the movement of spent fuel and other forms of radioactive material and waste. In that respect, it should be noted that the issue of "prenotification" is of particular concern to states. NGA should consider encouraging DOT to cooperate

with state, local and tribal governments to design and test a system of prenotification on the highway movement of radioactive materials and wastes, to include the point that existing prenotification systems in states not be preempted.

Recommendation 15:

THE AGREEMENT STATES SHOULD BE ENCOURAGED TO ADOPT CIVIL PENALTY AUTHORITY TO ASSIST IN ENFORCEMENT OF NUCLEAR WASTE REGULATIONS.

The same GAO report concluded that the enforcement program of Agreement States was not comparable to that of NRC's because only two of the 26 states have adopted civil penalty authority. Such authority could serve as an intermediate enforcement tool between a written notice of noncompliance and injunction authority—the two actions now available. This authority might encourage more effective and immediate compliance as opposed to just a written notice to a licensee.

Recommendation 16:

THE NRC SHOULD ESTABLISH NATIONAL STANDARDS FOR A "CRADLE TO GRAVE" MANIFEST SYSTEM—IN A COORDINATED AND MORE STREAMLINED VERSION OF THE HAZARDOUS WASTE PROGRAM UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT—TO TRACK LOW-LEVEL WASTE FROM THE POINT OF GENERATION TO THE POINT OF DISPOSAL. AGREEMENT STATES SHOULD BE ENCOURAGED TO ADOPT A COMPARABLE METHOD TO INCREASE REGULATORY OVERSIGHT ON A NATIONAL BASIS.

It is estimated that anywhere from 15% to 40% of low-level waste is not accounted for.

Recommendation 17:

THE NATIONAL GOVERNORS' ASSOCIATION SHOULD PLAY AN ACTIVE ROLE IN IMPLEMENTING THESE RECOMMENDATIONS AND IN WORKING WITH OTHER ORGANIZATIONS TO ACCOMPLISH THE GOALS AND OBJECTIVES SET FORTH IN THIS REPORT. TOWARD THAT END, THE TASK FORCE ENCOURAGES THE NGA TO ALLOCATE SPECIFIC FUNDING AND STAFF RESOURCES FOR IMPLEMENTATION OF THE RECOMMENDATIONS OF THIS REPORT.

CONCLUSION

Developing additional sites and disposal and source reduction techniques for low-level nuclear waste disposal is a critical national priority which requires the expeditious and cooperative action of all states. Clearly, every community in this nation benefits from the nuclear medicine and industrial uses which generate a large portion of this waste. Consequently, it is unfair to expect only three states to solely share the waste disposal burdens for the entire nation's benefits.

In addition to the question of the equity in sharing that burden, there is general consensus that in the next two decades, if the projected increases in national waste generation are accurate, between six and eight new disposal sites may be required. Failure to meet those needs could stifle the national health care delivery system and have serious effects on a major source of our electricity.

In this report, the Task Force has attempted to first define the pivotal issues related to the national waste disposal problem and then recommend pragmatic and innovative solutions.

The Task Force has concluded that the remaining issues are not technical, but matters of public policy and political decision-making. The consequences of inaction in developing additional sites were dramatically revealed last year with the temporary closure of two of the three national disposal facilities.

Therefore, the Task Force strongly emphasizes the need for prompt action by states to begin that important cooperative effort. The national challenge to safely and economically resolve the problems of low-level waste disposal can be met through the swift and responsible action of every state.

Affidavit of Booth Gardner in Support of Motion to Dismiss Complaint (dated 10/26/90).

STATE OF WASHINGTON)
) ss.
County of Thurston)

Booth Gardner, being duly sworn upon oath, deposes and says:

1. I am the Governor of the State of Washington.

2. The State of Washington has been a sovereign state of the United States since 1889. This affidavit is submitted in support of the annexed motion of the states of Washington, Nevada, and South Carolina for Summary Judgment and Dismissal of the above-captioned lawsuit.

3. In 1979, the state of Washington together with the states of Nevada and South Carolina concluded that the three states in which the commercial low-level radioactive waste disposal facilities operated had born the burden of providing disposal capacity for the entire nation long enough. The national problem of disposal of low-level radioactive waste required a national solution supported by all the states. Accordingly Governor Dixie Lee Ray, my predecessor as Governor of Washington, Governor Richard W. Riley of the state of South Carolina, and Governor Robert List of Nevada announced their determination to eventually close the three disposal facilities then in operation and urged Congress to pass legislation which ultimately became the Low-Level Radioactive Waste Policy Act of 1980, Public Law 96-573 (1980 Act).

4. The principal goal of that legislation was to provide for an equitable sharing of the burden of low-level radioactive waste disposal throughout the nation, thereby relieving Washington, South Carolina, and Nevada of this entire burden. Under the 1980 Act, Congress gave the responsibility for management of the disposal of low-level radioactive waste to each state within whose borders such waste is generated. The concept of state responsibility for the proper disposition of low-level radioactive waste was not an independent creation by Congress, but was cooperatively recommended and developed by the states through the National Governors Association which represents the governors of all fifty states. Under the 1980 Act, Congress encouraged the states to form regional compacts to develop regional low-level waste disposal facilities. Under the 1980 act, after January 1, 1986 the regional compacts were given the authority to restrict out-of-region waste from being disposed at the regional disposal site.

5. Prior to the 1980 act, the citizens of the state of Washington expressed their concerns over accepting other states low-level radioactive waste by passing overwhelmingly a ballot initiative preventing such waste acceptance. Although this measure was overturned in court, Washington citizens continue to express concerns over the known, potential, and perceived risks associated with nuclear waste disposal.

6. After the 1980 Act, significant progress was achieved in developing regional disposal compacts. As of 1985 over thirty states including Washington, Nevada, and South Carolina entered into seven regional compacts and at least two other states had decided to develop their own interstate disposal facilities. However, progress on achieving Congressional ratification of compacts was slowed by the fact that only the Northwest, Southeast, and Rocky Mountain Compact states would have had disposal capacity available as of January 1, 1986 and the other states would not have had any place to send their waste for disposal.

7. From 1980 to 1985, while new compacts had been formed, new disposal facility siting, design, construction, licensing, and operation were years off. With the January 1, 1986 deadline approaching, a potential disposal crisis existed. Again, the states took the lead in resolving the crisis. In July and August of 1984, Governor Riley of South Carolina and the Washington State Legislature substantially improved the prospects for ratification of compacts by announcing that they would consider accepting low-level waste from outside their compact regions for some period after January 1, 1986, if Congress would ratify their compacts. The states, again under the auspices of the National Governors Association, developed a compromise under which the states of Washington, South Carolina, and Nevada agreed to continue to accept all of the nation's waste for an additional seven years in exchange for incentives and penalties that would better guarantee that new sites would be developed. The state- generated and approved National Governors Association's proposal served as the foundation for Congressional action. In 1985 Congress took the state- developed compromise, unanimously passed the 1985 Amendments Act, and averted the potential low-level radioactive waste disposal crisis.

8. The state of Washington, as does New York, chooses to allow and license the construction and operation of various facilities which produce low-level radioactive waste as an agreement state under the Atomic Energy Act. Washington recognizes that the benefits of these operations accrue to all its citizens despite the burden of providing for waste disposal. Generators of low-level waste, licensed by and located in the state of New York for beneficial purposes, have continued to ship radioactive waste out of New York to one of the open disposal sites in Washington, South Carolina, or Nevada in reliance on the provisions of the Amendments Act.

9. Under the 1985 Amendments Act, significant progress has been made by several states and compacts in developing new low-level radioactive waste disposal capacity. The states of California, Arizona, North Dakota, and South Dakota consolidated from what would have been two Compacts into the Southwest Compact; California is the host-state of this Compact. Illinois is the host-state of the Central Midwest Compact made up of Illinois and Kentucky. Nebraska is the host-state of the Central Compact made up of Nebraska, Kansas, Oklahoma, Arkansas, and Louisiana. Texas is a go-it-alone state proposing to develop its own site without a regional compact. Each of these compacts and states have made progress toward development of operational low-level radioactive waste disposal facilities in compliance with the Amendments Act. California and Nebraska have submitted license applications for disposal facilities. California expects its facility to be operating before the end of 1991. Additionally, pursuant to the process set in motion by the Amendments Act, the Northwest Compact and the Rocky Mountain Compact have recently negotiated a proposed agreement whereby the states of Nevada, Wyoming, New Mexico, and Colorado will have access to the disposal site in Washington after 1992. This agreement furthers the Amendments Act policy to regionalize disposal capacity. The probability that the 1985 Amendments Act process will result in the orderly development of new disposal capacity throughout the nation has been central to my decision to provide continued access to the site located in Washington for the disposal of low-level radioactive waste pursuant to the Amendments Act.

10. If the act is determined to be unconstitutional or otherwise invalid, it is my intention to reevaluate the policy position Washington should take for continued operation of its disposal facility absent an agreement among the states for a national policy for comprehensive low-level radioactive waste management. In my opinion, the question whether states should take

title to waste after the deadline established by the Amendments Act is secondary to the question of whether states will face up to their collective responsibility as sovereigns and states of the union to solve this national crisis based on the compromise developed by the states and unanimously approved by Congress.

(Sworn to by Booth Gardner, October 26, 1990.)

Affidavit of Carroll A. Campbell, Jr. (dated 10/24/90).

STATE OF SOUTH CAROLINA)
)
COLUMBIA, SOUTH CAROLINA)

Carroll A. Campbell, Jr., being duly sworn, says:

1) I am Governor of the State of South Carolina.

2) The State of South Carolina has been a sovereign state since March 26, 1776, and became the eighth state of the United States when it ratified the Federal Constitution in 1788. This affidavit is submitted in support of the annexed motion of the states of Washington, Nevada, and South Carolina for Summary Judgment and Dismissal of the above-captioned lawsuit.

3) In 1979, the State of South Carolina together with the States of Nevada and Washington, concluded that the three states in which commercial low-level radioactive waste disposal facilities operated had borne the burden of providing disposal capacity for the entire nation long enough. The national problem of disposal of low-level radioactive waste required a national solution supported by all the states. Accordingly, Governor Richard W. Riley, my predecessor as Governor of South Carolina, and Governor Robert List of Nevada and Governor Dixie Lee Ray of Washington announced their determination to eventually close the three disposal facilities then in operation and urged Congress to pass legislation which ultimately became the Low-Level Radioactive Waste Policy Act of 1980, Public Law 96-573 (1980 Act).

4) The principal goal of that legislation was to provide for an equitable sharing of the burden of low-level radioactive waste disposal throughout the nation, thereby relieving South

Carolina, Washington, and Nevada of this entire burden. Under the 1980 Act, Congress gave the responsibility for management of the disposal of low-level radioactive waste to each state within whose borders such waste is generated. The concept of state responsibility for the proper disposition of low-level radioactive waste was not an independent creation by Congress, but was cooperatively recommended and developed by the states through the National Governors Association which represents the governors of all fifty states. Under the 1980 Act, Congress encouraged the states to form regional compacts to develop regional low-level waste disposal facilities. Under the 1980 Act, after January 1, 1986 the regional compacts were given the authority to restrict out-of-region waste from being disposed at the regional disposal site.

5) After the 1980 Act, significant progress was achieved in developing regional disposal compacts. As of 1985, over thirty states including South Carolina, Washington, and Nevada entered into seven regional compacts and at least two other states had decided to develop their own interstate disposal facilities. However, progress on achieving Congressional ratification of compacts was slowed by the fact that only the Northwest, Southeast, and Rocky Mountain Compact states would have had disposal capacity available as of January 1, 1986.

6) From 1980 to 1985, while new compacts had been formed, new disposal facility siting, design, construction, licensing, and operation were years off. With the January 1, 1986 deadline approaching, a potential disposal crisis existed. Again, the states took the lead in resolving the crisis. In July and August of 1984, Governor Riley of South Carolina and the Washington State Legislature substantially improved the prospects for ratification of compacts by announcing that they would consider accepting low-level waste from outside their compact regions for some period after January 1, 1986, if

Congress would ratify their compacts. The states, again under the auspices of the National Governors Association, developed a compromise under which the states of South Carolina, Washington, and Nevada agreed to continue to accept all of the nation's waste for an additional seven years in exchange for incentives and penalties that would better guarantee that new sites would be developed. The state-generated and approved National Governors Association's proposal served as the foundation for Congressional action. In 1985, Congress took the state-developed compromise, unanimously passed the 1985 Amendments Act, and averted the potential low-level radioactive waste disposal crisis.

7) The State of South Carolina, as does New York, chooses to allow and license the construction and operation of various facilities which produce low-level radioactive waste as an agreement state under the Atomic Energy Act. South Carolina recognizes that the benefits of these operations accrue to all its citizens despite the burden of providing for waste disposal. Generators of low-level waste, licensed by and located in the state of New York for beneficial purposes, have continued to ship the radioactive waste out of New York to one of the open disposal sites in South Carolina, Washington, or Nevada in reliance on the provisions of the Amendments Act.

8) Under the 1986 Amendments Act, significant progress has been made by several states and compacts in developing new low-level radioactive waste of disposal capacity. The states of California, Arizona, North Dakota, and South Dakota consolidated from what would have been two Compacts into the Southwest Compact; California is the host-state of this Compact. Illinois is the host-state of the Central Midwest Compact made up of Illinois, and Kentucky. Nebraska is the host-state of the Central Compact made up of Nebraska, Kansas, Oklahoma, Arkansas, and Louisiana. Texas is a go-it-alone state proposing to develop its own site without a regional

compact. Each of these compacts and states have made progress toward development of operational low-level radioactive waste disposal facilities in compliance with the Amendments Act. California and Nebraska have submitted license applications for disposal facilities. California expects its facility to be operating before the end of 1991. Additionally, pursuant to the process set in motion by the Amendments Act, the Northwest Compact and the Rocky Mountain Compact have recently negotiated an agreement whereby the states of Nevada, Wyoming, New Mexico, and Colorado will have access to the disposal site in Washington after 1992. This agreement furthers the Amendments Act Policy to regionalize disposal capacity. The probability that the 1985 Amendments Act process will result in the orderly development of new disposal capacity throughout the nation has been central to my decision to provide continued access to the site located in South Carolina for the disposal of low-level radioactive waste pursuant to the Amendments Act.

9) If the Act is determined to be unconstitutional or otherwise invalid, it is my intention to re-evaluate the policy position South Carolina should take toward continued operation of the disposal facility absent an agreement among the states for a national policy for comprehensive low-level radioactive waste management. In my opinion, the question whether states should take title to waste after the deadline established by the Amendments Act is secondary to the question of whether states will face up to their collective responsibility as sovereigns and states of the Union to solve the national crisis based on the compromise developed by the states and unanimously approved by Congress.

(Sworn to be Carroll A. Campbell, Jr., October 24, 1990.)

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Affidavit of Robert J. Miller in Support of Motion to Dismiss Complaint (dated 11/1/90).

STATE OF NEVADA)
) ss:
CARSON CITY)

Robert J. Miller, being first duly sworn, deposes and says:

1. I am Governor of the State of Nevada.

2. The State of Nevada has been a sovereign state of the United States since October 31, 1864. This Affidavit is submitted in support of the annexed Motion of the States of Washington, Nevada and South Carolina for Summary Judgment and Dismissal of the above-captioned lawsuit.

3. In 1979, the State of Nevada, together with the States of South Carolina and Washington, concluded that the three states in which commercial low-level radioactive waste disposal facilities operated had borne the burden of providing disposal capacity for the entire nation long enough. The national problem of disposal of low-level radioactive waste required a national solution supported by all the states. Accordingly, Governor Robert List, my predecessor as Governor of Nevada, Governor Richard Riley of the State of South Carolina, and Governor Dixie Lee Ray of Washington announced their determination to eventually close the three disposal facilities then in operation and urged Congress to pass legislation which ultimately became the Low-Level Radioactive Waste Policy Act of 1980, Public Law 96-573 (1980 Act).

4. The principal goal of that legislation was to provide for an equitable sharing of the burden of low-level radioactive waste disposal throughout the nation, thereby relieving Washington, South Carolina, and Nevada of this entire burden.

Under the 1980 Act, Congress gave the responsibility for management of the disposal of low-level radioactive waste to each state within whose borders such waste is generated. The concept of state responsibility for the proper disposition of low-level radioactive waste was not an independent creation by Congress, but was cooperatively recommended and developed by the states through the National Governors Association which represents the governors of all fifty states. Under the 1980 Act, Congress encouraged the states to form regional compacts to develop regional low-level waste disposal facilities. Under the 1980 Act, after January 1, 1986 the regional compacts were given the authority to restrict out-of-region waste from being disposed at the regional disposal site.

5. After the 1980 Act, significant progress was achieved in developing regional disposal compacts. As of 1985, over thirty states including Washington, Nevada, and South Carolina entered into seven regional compacts and at least two other states had decided to develop their own intrastate disposal facilities. However, progress on achieving Congressional ratification of compacts was slowed by the fact that only the Northwest, Southeast, and Rocky Mountain Compact states would have had disposal capacity available as of January 1, 1986 and the other states would not have had any place to send their waste for disposal.

6. From 1980 to 1985, while new compacts had been formed, new disposal facility siting, design, construction, licensing, and operation were years off. With the January 1, 1986 deadline approaching, a potential disposal crisis existed. Again, the states took the lead in resolving the crisis. In July and August of 1984, Governor Riley of South Carolina and the Washington State Legislature substantially improved the prospects for ratification of compacts by announcing that they would consider accepting low-level waste from outside their compact regions for some period after January 1, 1986, if

Congress would ratify their compacts. The states, again under the auspices of the National Governors Association, developed a compromise under which the States of Washington, South Carolina, and Nevada agreed to continue to accept all of the nation's waste for an additional seven years in exchange for incentives and penalties that would better guarantee that new sites would be developed. The state-generated and approved National Governors Association proposal served as the foundation for Congressional action. In 1985, Congress took the state-developed compromise, unanimously passed the 1985 Amendments Act, and averted the potential low-level radioactive waste disposal crisis.

7. The State of Nevada, as do other states, chooses to allow the construction and operation of various facilities which produce radioactive waste, recognizing that benefits of these operations accrue to the citizens despite the burden of providing for waste disposal. Generators of low-level waste licensed by and located in the State of New York for beneficial purposes have continued to ship radioactive waste out of New York to one of the open disposal sites in Washington, South Carolina, or Nevada in reliance on the provisions of the Amendments Act.

8. Under the 1985 Amendments Act, significant progress has been made by several states and compacts in developing new low-level radioactive waste disposal capacity. The states of California, Arizona, North Dakota, and South Dakota consolidated form what would have been two Compacts into the Southwest Compact; California is the host-state of this Compact. Illinois is the host-state of the Central Midwest Compact made up of Illinois, and Kentucky. Nebraska is the host-state of the Central Compact made up of Nebraska, Kansas, Oklahoma, Arkansas, and Louisiana. Texas is a go-it-alone state proposing to develop its own site without a regional compact. Each of these compacts and states have made progress toward

development of operational low-level radioactive waste disposal facilities in compliance with the Amendments Act. California and Nebraska have submitted license applications for disposal facilities. California expects its facility to be operating before the end of 1991. Additionally, pursuant to the process set in motion by the Amendments Act, the Northwest Compact and the Rocky Mountain Compact have recently negotiated an agreement whereby the States of Nevada, Wyoming, New Mexico, and Colorado will have access to the disposal site in Washington after 1992. This agreement furthers the Amendments Act Policy to regionalize disposal capacity. The probability that the 1985 Amendments Act process will result in the orderly development of new disposal capacity throughout the nation has been central to my decision to provide continued access to the site located in Nevada for the disposal of low-level radioactive waste pursuant to the Amendments Act.

9. If the Act is determined to be unconstitutional or otherwise invalid, it is my intention to re-evaluate the policy position Nevada should take toward continued operation of the disposal facility absent an agreement among the states for a national policy for comprehensive low-level radioactive waste management. In my opinion, the question whether states should take title to waste after the deadline established by the Amendments Act is secondary to the question of whether states will face up to their collective responsibility as sovereigns and states of the Union to solve this national crisis based on the compromise developed by the states and unanimously approved by Congress.

10. Further affiant sayeth not.

(Sworn to by ROBERT J. MILLER.)

Nos. 91-543; 91-558; 91-563

FEB 13 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGHENY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER THE COUNTY OF CORTLAND, NEW YORK

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QUESTIONS PRESENTED

1. Whether constitutional principles of federalism expressed in the Tenth Amendment and the Guarantee Clause of the United States Constitution bar Congress from issuing direct commands to the states compelling them to undertake specific waste disposal programs, precluding their withdrawal from the field, and punishing noncompliance by forcibly transferring the waste to the states, as has been done in the Low-Level Radioactive Waste Policy Amendments Act of 1985.

2. Whether the political process adequately protects state sovereignty when Congress avoids political accountability for an unpopular radioactive waste disposal program by shifting the entire financial and administrative responsibility for the program exclusively to the states.

LIST OF PARTIES TO THE CASE IN THE SECOND CIRCUIT

1. The State of New York, Plaintiff-Appellant

2. The County of Allegany, New York, Plaintiff-Appellant

3. The County of Cortland, New York, Plaintiff-Appellant

4. The United States of America, Defendant-Appellee

5. James D. Watkins, as Secretary of Energy, Defendant-Appellee

6. Kenneth M. Carr, as Chairman of the United States Nuclear Regulatory Commission, Defendant-Appellee[1]

7. The United States Nuclear Regulatory Commission, Defendant-Appellee

8. Samuel K. Skinner, as Secretary of Transportation, Defendant-Appellee[2]

9. Richard Thornburgh, as United States Attorney General, Defendant-Appellee[3]

10. State of Washington, Intervenor-Appellee

11. State of Nevada, Intervenor-Appellee

12. State of South Carolina, Intervenor-Appellee

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[1] Kenneth M. Carr, former Chairman of the United States Nuclear Regulatory Commission, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, Ivan Selin, Mr. Carr's successor in office, has been substituted as a party in this proceeding.

[2] Samuel K. Skinner, former Secretary of Transportation, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, Admiral James B. Busey IV, Mr. Skinner's successor in office, has been substituted as a party in this proceeding.

[3] Richard Thornburgh, former United States Attorney General, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, William P. Barr, Mr. Thornburgh's successor in office, has been substituted as a party in this proceeding.

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OPINIONS AND JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated August 8, 1991, is reported at 942 F.2d 114 and is reprinted at 1a of the appendix to the petition for a writ of certiorari submitted by the County of Cortland, New York ("Cortland County").

The opinion of the United States District Court for the Northern District of New York, dated December 7, 1990, is reported at 757 F. Supp. 10 and is reprinted at 18a of the appendix to Cortland County's petition for a writ of certiorari.

The judgment of the United States District Court for the Northern District of New York, dated December 26, 1990, is reprinted at 27a of the appendix to Cortland County's petition for a writ of certiorari.

JURISDICTION

Petitioner Cortland County, together with the State of New York and the County of Allegany, New York, filed this action on or about February 12, 1990. The district court had jurisdiction of the case pursuant to 28 U.S.C. §§ 1331, 1337, 1346, 2201, and 2202. The trial court heard oral argument on dispositive motions on December 7, 1990 and issued an opinion from the bench that day in favor of the defendants. Cortland County filed a Notice of Appeal on or about January 30, 1991. The opinion of the United States Court of Appeals for the Second Circuit, affirming the decision below, was issued on August 8, 1991. Cortland County filed a petition for a writ of certiorari on October 3, 1991, pursuant to 28 U.S.C. § 1254(1). This Court granted Cortland County's petition on January 10, 1992.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves fundamental principles of federalism established in the United States Constitution, especially as expressed in the following provisions:

The Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Guarantee Clause: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4.

The statute challenged in this case is the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j. Pertinent portions of the statute challenged are reprinted at 29a-33a of the appendix to Cortland County's petition for a writ of certiorari.

STATEMENT OF THE CASE

This declaratory judgment action challenges the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPAA"), 42 U.S.C. §§ 2021b-2021j, as violative of constitutional principles of federalism. LLRWPAA is the federal response to the perceived shortage of low-level radioactive waste ("LLRW") disposal facilities that existed in the mid-1980s.

The national effort to expand LLRW disposal capacity began in the late 1970s, following the closure of three of the existing six disposal facilities as a result of serious environmental problems. In furtherance of that effort, the State Planning Council on Radioactive Waste, the National Conference of State Legislatures, and the National Governors' Association ("NGA") submitted recommendations to Congress.

In its final report, the NGA recommended that the states "accept primary responsibility" for the safe disposal of LLRW generated within their borders, "except for waste generated at federal government facilities." J.A.* 114a (NGA Recommendation No.1). The NGA also suggested that Congress "create a special discretionary fund which would confer compensatory and financial benefits to site states and site communities . . . ." J.A. 130a-31a (NGA Recommendation No. 8). In addition, the NGA's report stated unequivocally:

* "J.A." refers to the Joint Appendix submitted in connection with this proceeding. "C.A. App." refers to the joint appendix submitted to the Court of Appeals for the Second Circuit in connection with the appeal below.

> Federal funds must be made available for site characterization studies, planning grants, and other technical assistance for states to develop regional sites. Such funding should be made available in a manner to encourage development of regional sites.

J.A. 133a (NGA Recommendation No. 9). The NGA appeared to contemplate that six regional disposal sites would be constructed pursuant to their recommendations. *See* J.A. 119a-20a (NGA Recommendation No. 3).

Instead of adopting the recommended policy of *voluntary, primary* state control, with continued federal responsibility for disposal of federally generated waste and substantial federal financial assistance to the states, Congress altogether abdicated its responsibility for the siting and funding of LLRW disposal facilities by transferring that responsibility exclusively to the states. On December 22, 1980, Congress enacted the Low-Level Radioactive Waste Policy Act (the "LLRW Policy Act"), Pub. L. No. 96-573, 94 Stat. 3347, mandating that each state (alone or in a compact with other states) take responsibility for providing for disposal of the LLRW generated within its borders – including some of the waste generated by the federal government. Congress appropriated no funds whatsoever for direct financial assistance to the states.

The LLRW Policy Act set forth a specific timetable for facility development. Congress encouraged compliance by empowering compacts formed pursuant to the statute to exclude waste generated outside the compact region from disposal at the compact facility after January 1, 1986. *See id.* §§ 4(a)(1), 4(a)(2)(B). Nevertheless, in the years following the enactment of the LLRW Policy Act, there was little progress in developing new sites. With the 1986 deadline looming, it became clear that enforcement of the exclusion provision would deny many LLRW generators access to licensed facilities for disposal of their waste.

Consequently, Congress amended the LLRW Policy Act in January 1986, enacting LLRWPAA, which extended the exclusion provision, set new deadlines for facility development, and established stiff monetary sanctions for failure to meet them.

See 42 U.S.C. § 2021e(d). Congress also provided that if a state is unable, by January 1, 1996, to provide for disposal of all commercially generated LLRW produced within its borders, the waste generators may compel the state to take title to their LLRW and either deliver the waste to the state or hold it liable for any damages they incur as a result of the state's failure to take possession. *See* 42 U.S.C. § 2021e(d)(2)(C) (the "Take Title Provision").

While Congress unloaded the onerous duties of disposal onto the states, it perpetuated exclusive federal authority to determine how LLRW should be regulated. The licensing and operations of nuclear power plants, which produce most of the nation's LLRW (by volume and radioactivity), are subject to the sole jurisdiction of the Nuclear Regulatory Commission (the "NRC"). *See* J.A. 51a, 60a. LLRWPAA confers no power upon the states to regulate the generation, treatment, management, transportation, or disposal of LLRW in a manner inconsistent with NRC or Department of Transportation regulations. *See* 42 U.S.C. § 2021d(b)(3).

Indeed, New York's efforts to limit the proliferation of nuclear power plants and the radioactive waste they generate have been repeatedly thwarted by the federal government. Despite New York's sustained and vigorous opposition, the Shoreham nuclear power plant was licensed by the NRC.[5] *See Cuomo v. Nuclear Regulatory Commission*, 772 F.2d 972 (2d Cir. 1985); *Cuomo*

[5] Much of the litigation concerning the reactor at Shoreham arose out of a dispute over emergency planning. The off-site emergency planning rules adopted by the NRC in 1980, *see* 10 C.F.R. §§ 50.33, 50.47, 50 App. E, established a central role for state and local governments – virtually the only opportunity these governments had to try to stop the plant from opening. *See* Note, *Federalism and Offsite Emergency Planning for Nuclear Reactors: The Shoreham Impasse*, 66 B.U.L. Rev. 229, 256 (1986). Specifically, the rules required that a proposed licensee submit state and local governments' emergency response plans for a proposed nuclear power plant to the NRC as a condition for the issuance of a license for the plant. After Suffolk County concluded that no emergency plan could adequately protect the population living near Shoreham, the county and the State of New York refused to submit such a plan to the NRC. The NRC reinterpreted its rules to circumvent the requirement for state and local participation, and the State sued. (It should be noted that LLRWPAA does not allow state or local governments to block an LLRW disposal facility by withholding an emergency plan.)

v. Long Island Lighting Co., No. 84-4615, slip op. (Sup. Ct. 1985). The City of New York has also unsuccessfully endeavored to restrict the shipment of radioactive material through the city limits. *See City of New York v. United States Department of Transportation*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984). Congress has thus deprived the State of any meaningful authority over the production and environmental control of the waste, *see* J.A. 60a-61a, while saddling it (and select counties) with politically explosive, economically risky, and environmentally threatening LLRW disposal obligations.

Under LLRWPAA, the states may, but are not required to, dilute these burdens by entering compacts for operation of regional LLRW disposal facilities. *See* 42 U.S.C. § 2021c. The statute does not, however, require compact members to admit other interested states. *See* Office of Technology Assessment, *Partnerships Under Pressure* 12 n.20 (1989). As a result, LLRWPAA contains no internal limit on the number of disposal sites that may be established pursuant to its mandate. Rather, any state that is unable or unwilling to enter a compact or that cannot contract to send the LLRW generated within its borders to an out-of-state site must build its own facility, irrespective of the environmental suitability of that state as a location for shallow land burial.[6] As such a state, New York is now compelled to develop its own disposal facility in-state.[7]

[6] To Cortland County's knowledge, the NRC has never licensed any LLRW disposal facility using a disposal method other than shallow land burial. Based on New York's disastrous experience at West Valley, however, that disposal method is now unlawful in New York. *See* N.Y. Envtl. Conserv. Law § 29-0103. Moreover, the NRC has yet to promulgate regulations describing technical and licensing requirements for alternatives to near-surface disposal. States wishing to adopt such alternatives – a drift mine or a deep vertical shaft mine, for example – are therefore forced to work in a regulatory vacuum and run the risk that, at the end of a lengthy research and development process, licenses will not be granted.

[7] Moreover, LLRWPAA's disposal requirement may effectively preclude New York from experimenting with innovative LLRW management techniques, such as long-term storage at the point of generation. *See* 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Hart). On-site storage would, however, be a practical alternative for LLRW management in New York. *See*

(Footnote continued)

Siting activities undertaken pursuant to LLRWPAA's mandate have already caused Cortland County severe financial harm. *See* J.A. 66a-67a. Land values have dropped by as much as 50 percent in the Town of Taylor and other towns in close proximity to the proposed disposal sites. *See id.* at 66a. By September 1990, Cortland County had spent more than $310,000 to participate in the site selection process, and projected costs for continuing involvement were estimated at $300,000 per year. *See id.* at 67a. This projected appropriation far exceeded Cortand County's individual 1990 budgets for Juvenile Delinquent Care, Youth At Risk, Aid to Dependent Children, Alcohol Service, Mental Health, Stop DWI, and the Planning Department. *See id.*

Political heat generated by the selection of unnecessary, expensive, and environmentally unsuitable LLRW disposal sites is predictably directed largely at the state and local officials directly responsible for implementation of the siting process rather than at the federal politicians ultimately responsible for setting it in motion. *See id.* at 67a-69a, 81a-82a. In Cortland County, for example, protesters have repeatedly blocked the Siting Commission's access to the proposed site, and opponents have hounded New York's Governor during his appearances throughout the state. *See id.* at 68a-69a.

In sum, the intrusion upon state sovereignty effected by LLRWPAA is unprecedented. In the instant case, each branch of New York State government – legislative, executive, and judicial – has been conscripted into the service of federal goals. State legislative energies have been diverted to the drafting, debate, enactment, and revision of state LLRW disposal laws that would never have been contemplated but for the enactment of LLRWPAA. *See* J.A. 81a-82a. Congress has also commandeered New York's executive machinery by compelling the State to develop and administer new regulatory programs for

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J.A. 55a-58a. Medical and academic waste can be and often is stored on-site for decay and then disposed of in ordinary landfills. *See id.* at 56a. Nuclear power plants have stored high-level radioactive waste ("HLRW") on-site since they started operation and will probably be required to continue such storage for decades. *See id.* at 57a. Because the utilities produce highly radioactive Class "C" LLRW in very small volumes, that waste could very likely be stored without difficulty in their on-site HLRW storage facilities. *See id.* at 51a-52a.

land disposal. *See* 6 New York Codes, Rules & Regulations Part 382. Finally, New York's judicial processes will be compelled to assume the task of enforcing LLRWPAA's sanctions against the State – even without prior waiver of the State's sovereign immunity.

LLRWPAA's direct orders to the states, which were upheld by the courts below, do not "gradually erase the diffusion of power between State and Nation." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting). Those commands, enforced with extraordinary punitive sanctions, summarily transform the states into instruments of the federal will. Because that incursion upon state sovereignty is inconsistent with fundamental principles of federalism expressed in the Tenth Amendment and the Guarantee Clause of the United States Constitution, the decision of the Court of Appeals should be reversed.

SUMMARY OF ARGUMENT

This challenge of LLRWPAA presents an issue of first impression for this Court: whether Congress may compel the states to exercise governmental functions in an area where they would prefer to remain inactive. All statutes previously reviewed by this Court have merely involved federal efforts to regulate ongoing, voluntary state activity. Because this Court has never addressed the situation presented here, neither the holding nor the theory of federalism developed in *Garcia* (which is indisputably the leading Tenth Amendment case) is directly controlling here. Consequently, this Court may, and should, declare LLRWPAA unconstitutional without applying *Garcia*'s Tenth Amendment standard.

LLRWPAA should be found unconstitutional because the statute violates limits on congressional power inherent in the constitutional structure. This Court has consistently recognized, irrespective of the particular theory of federalism that has governed the Court's decisions at any given time over the past 20 years, that a federal statute that compelled the states to undertake an activity against their will and precluded them from withdrawing from the field would violate constitutional principles of federalism. Because LLRWPAA is precisely such a

statute, the Court should expressly affirm the rule implicit in its prior decisions and declare LLRWPAA unlawful and void.

Even if *Garcia*'s Tenth Amendment standard were to be applied to the circumstances of this case, the Court should find LLRWPAA unconstitutional because the political safeguards intended to protect the sovereignty of the states failed when Congress enacted LLRWPAA. Contrary to the decisions of the courts below, those political safeguards cannot be understood to have fulfilled their function in this case merely because the states had an opportunity to participate in the legislative process. A properly functioning political system requires that Congress remain accountable for its actions when it imposes burdens on the states as states. Because Congress structured LLRWPAA to avoid such accountability, and to defeat the operation of natural political checks on federal power, LLRWPAA violates constitutional principles of federalism.

ARGUMENT

POINT I

LLRWPAA MAY BE FOUND UNCONSTITUTIONAL WITHOUT APPLYING *GARCIA*'S TEST FOR VIOLATIONS OF PRINCIPLES OF FEDERALISM

During the past 20 years, this Court has twice overruled Tenth Amendment cases, and, in so doing, has completely recast the standard governing Tenth Amendment challenges to federal acts. *See Garcia* (overruling, in 1985, *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *National League of Cities* (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)). *National League of Cities* established four conditions for immunity from federal regulation under the Commerce Clause:

> First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission."

Garcia, 469 U.S. at 537 (quoting *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 & n.29 (1981) (quoting *National League of Cities*, 426 U.S. at 845, 852, 854)). The Court rejected this test (the "Traditional Function Test") in *Garcia* and sought a standard that did not rely upon "predetermined notions of sovereign power." *Garcia*, 469 U.S. at 550.

The *Garcia* Court located the first line of defense for state sovereign interests in the "procedural safeguards inherent in the structure of the federal system" rather than in substantive exceptions from the commerce power. *Id.* at 552. The Court concluded that:

> the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate "a sacred province of state autonomy."

Id. at 554 (quoting *Equal Employment Opportunity Commission v. Wyoming* ("*EEOC*"), 460 U.S. 226, 236 (1983)). In recognizing the possibility of failure, the Court adumbrated a new test (the "Process Failure Test") for violations of constitutional principles of federalism. As is explained below, the Process Failure Test does not apply under the circumstances of this case.

A. *LLRWPAA Compels the States to Exercise Governmental Actions in an Area Where They Choose to Remain Inactive*

The coercive effect of LLRWPAA is evident on the face of the statute. The statute provides in unequivocal terms: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of" LLRW. 42

U.S.C. § 2021c(a)(1). No state is exempt from LLRWPAA's requirements; no state may cede the field to federal regulatory authorities; no state may transfer its federally imposed responsibilities to private generators of LLRW.

LLRWPAA also expressly provides:

> By July 1, 1986, each [state that is not a member of a compact region] shall ratify compact legislation, or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within the State.

42 U.S.C. § 2021e(e)(1)(A). Thus, Congress has issued direct orders to the legislature or highest executive officer of each non-compact state, commanding specific action with respect to the establishment of a LLRW disposal facility. The statute also specifies in detail the contents of the siting plan that must be prepared by each of those states. *See id.* at § 2021e(e)(1)(B)(ii) and (iii). These are additional non-delegable duties imposed upon the states by the statute.

LLRWPAA thus does not merely require the states to *weigh* federal regulatory proposals governing *voluntary* state activity, as was the case in *Federal Energy Regulatory Commission v. Mississippi* ("*FERC*"), 456 U.S. 742 (1982). LLRWPAA sets "a mandatory agenda to be considered in all events by state legislative or administrative decisionmakers," *id.* at 769, and compels the states to *promulgate* congressionally prescribed laws or regulations to govern the states' *involuntary* participation in the LLRW disposal business. The fact that the statute affords some flexibility on administrative or technical matters does not mitigate the intrusion effected by LLRWPAA's "interference in the States' legislative processes, the heart of their sovereignty." *Thompson v. Oklahoma*, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting).

Indeed, the federal government compounds the intrusion effected by LLRWPAA by forcing the states to operate in a

regulatory vacuum.[8] The specific "technical requirements for alternative methods" of LLRW disposal, promised for years by the NRC, 10 C.F.R. § 61.7, have yet to materialize. States may have traditionally served as "laboratories for . . . experiment," *Garcia*, 469 U.S. at 546, but Congress impermissibly intrudes upon state autonomy when it compels the states to develop disposal alternatives without adequate technological guidance.[9] *See FERC*, 456 U.S. at 777 ("State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study.") (O'Connor, J., concurring in the judgment in part and dissenting in part).

In addition to the affirmative disposal obligations imposed by LLRWPAA, the statute contains a novel and extreme penalty for a state's failure to provide for such disposal by 1996. The statute compels the state to take title to and possession of all LLRW offered to it from generators and owners producing such waste in the state or to assume liability for all damages incurred by those generators and owners as a result of the failure to accept that waste. To our knowledge, LLRWPAA is the first federal statute in the history of this nation seeking to impose such a liability on the states.[10]

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[8] The mere availability of a "technical position" on licensing alternative methods of disposal or of a standard guide review plan for the construction of earth covered cement vaults and bunkers, *see* C.A. App. 166, does not provide the sort of detailed regulatory structure required by states such as New York that are considering alternatives such as drift mines or deep vertical shaft mines.

[9] The lack of adequate technical guidance is especially burdensome when the physical features of a state — its hydrology, geology, and climate — are not conducive to radioactive waste disposal. *See* J.A. 59a.

[10] The extent of the liability that can be incurred as a result of taking title to and possession of radioactive waste is illustrated in *Amoco Oil Company v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989), where remedial costs for minor radioactive contamination at just one small site were estimated at $11-17 million.

B. Garcia *Applies Only When the Federal Government Attempts to Regulate Voluntary State Activity*

Both *National League of Cities* and *Garcia* involved challenges to the Fair Labor Standards Act ("FLSA"). The plaintiffs in those cases contested the application of FLSA's wage and hour provisions to employees of the states and their political subdivisions. The test developed in each case was thus designed to identify circumstances when the federal government could lawfully regulate employment practices of states and municipalities. Clearly, the specific holding of *Garcia* does not control the outcome of this case. *See City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057, 1060-61 (5th Cir. 1987) ("Inasmuch as *Garcia* upheld the application of the Fair Labor Standards Act against a city entity as a valid execution of congressional power under the commerce clause, it may or may not be controlling in this case.").

More importantly, the general test adumbrated in *Garcia* does not apply in the circumstances described here. Both the Process Failure Test and *National League of Cities*' Traditional Function Test have consistently been applied only to statutes that regulate ongoing voluntary state activity.[11] LLRWPAA does not regulate activities that the state has chosen to undertake; it commands the states to undertake certain operations against their will.[12] These unprecedented direct orders to enter and remain

[11] *See, e.g., South Carolina v. Baker*, 485 U.S. 505 (1988) (issuance of state and local government bonds); *EEOC, supra* (state and local government employment); *FERC, supra* (public utility regulation).

[12] The federal respondents erroneously assert that Cortland County has failed to identify alternatives to LLRWPAA's compulsory scheme that would have provided for LLRW disposal without imposing unavoidable responsibilities on the states. *See* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 21 n.24. As is set forth clearly in Cortland County's petition, there are a variety of indisputably lawful alternatives available and well known to Congress. *See* Cortland County's Petition for a Writ of Certiorari at 17-27. At least two of these alternatives are consistent with the states' expressed preferences at the time that LLRWPAA was enacted. First, Congress could have adopted the same system it has already employed for the

(Footnote continued)

in the LLRW disposal business remove LLRWPAA from the scope of *Garcia*.

C. Garcia *Recognizes Affirmative Limits on Federal Power Independent of the Operations of the Political Process*

Even if the instant case were governed by the decision in *Garcia*, the reasoning of that case supports Cortland County's argument that the Process Failure Test is inapplicable here. In developing that test, the Court repeatedly characterized the political process as the *primary* defense of state sovereignty. *See Garcia*, 469 U.S. at 554 (stating that the "fundamental" limitation on the Commerce Clause is one of process); *id.* at 556 ("[T]he principal and basic limit on the federal commerce power is that inherent in . . . built-in [systemic] restraints . . ."). The admission that process serves as "the *principal* means chosen by the Framers to ensure the role of the States in the federal system" carries with it the recognition that the political process alone may not adequately protect state sovereignty. *Id.* at 550 (emphasis added). In exceptional situations, such as that presented by the enactment of LLRWPAA, "affirmative limits" on federal action derived directly from the constitutional structure constrain congressional exercises of the commerce power. *Id.* at 556.

POINT II

CONGRESS EXCEEDED CONSTITUTIONAL LIMITS WHEN IT ENACTED LLRWPAA

The facts of *Garcia* did not require this Court to "identify or define" the affirmative limits imposed by the constitutional structure. *Id.* One need look no further than this Court's recent

regulation of nuclear materials, whereby the states may choose to regulate themselves or to have the federal government administer a regulatory program within their borders. *See* 42 U.S.C. § 2021(b). Alternatively, Congress could have implemented the NGA's funding recommendations, *see* J.A. 130a-31a, 133a (NGA Recommendations Nos. 8-9), by conditioning financial assistance upon compliance with federal requirements, *see South Dakota v. Dole*, 483 U.S. 203 (1987), instead of imposing the entire financial burden on the states, as it has done in LLRWPAA.

Tenth Amendment decisions, however, to find a clear indication of the character of that constraint. As the following analysis shows, the one principle that has survived the vicissitudes of the modern law of federalism — namely, the rule prohibiting the commandeering of state machinery for federal purposes — defines the limit on congressional power under the Commerce Clause.

A. *This Court's Decisions Identify the Constitutional Constraint on Federal Power Left Undefined in* Garcia

The nature of the protection afforded to the states by constitutional principles of federalism has been the subject of intense dispute on this Court throughout the tenure of *National League of Cities* and *Garcia*. Dissenting, and even concurring, opinions record the jurisprudential debate about the appropriate test to be applied when adjudicating Tenth Amendment cases. *See, e.g., South Carolina v. Baker* ("*S.C. v. Baker*"), 485 U.S. 505, 530-34 (1988) (O'Connor, J., dissenting); *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *EEOC*, 460 U.S. at 244-51 (Stevens, J., concurring).

The application of a prevailing Tenth Amendment standard in specific cases has also generated considerable controversy on the Court. Members of the majority in *National League of Cities* repeatedly criticized decisions applying the Traditional Function Test as insufficiently sensitive to the limits of federal power. *See EEOC*, 460 U.S. at 251-65 (Burger, C.J., dissenting); *id.* at 265-75 (Powell, J., dissenting); *FERC*, 456 U.S. at 772-75 (Powell, J., concurring in part and dissenting in part).

Despite the dissension, however, this Court has consistently affirmed that principles of federalism impose some limit on the power of Congress. Indeed, one very specific constraint emerges from the Tenth Amendment cases discussed below. The *per se* rule tacitly recognized in those cases bars Congress from commandeering state governmental processes to serve federal goals.

1. *Hodel*

Hodel involved a challenge to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which established federal environmental protection performance standards for coal mining operations. SMCRA permitted states to establish their own regulatory programs to implement the federal standards and provided for direct federal enforcement of the standards in the absence of such programs. Citing a "wealth of precedent" attesting to congressional authority to preempt state laws governing private activity, the Court upheld SMCRA's program of "cooperative federalism" against Virginia's Tenth Amendment challenge. *Hodel*, 452 U.S. at 289-90.

The option SMCRA offered to the states of ceding responsibility for mining regulation to the federal government was key to this Court's decision in *Hodel*. Because the states could simply withdraw from the field, "the States [were] not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.* at 288. Under such circumstances, the Court rejected the "suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program." *Id. Hodel* clearly implies that the statute would have unconstitutionally intruded upon the sovereignty of the states had it directly compelled such state action.

2. *FERC*

The federal requirements at issue in *FERC* were more intrusive than those in *Hodel*. In *FERC*, provisions of the Public Utilities Regulatory Policies Act ("PURPA") required state regulatory authorities to implement certain federal rules. *See FERC*, 456 U.S. at 759. PURPA also required that state utility commissions "consider," within certain deadlines, the adoption and implementation of specified ratemaking standards. *Id.*

The Supreme Court applied the doctrine of preemption in upholding the obligation to implement federal rules. A variation of the doctrine was also invoked to uphold the requirement that the state consider adoption of the specified standards. The

Court reasoned that because the federal government could have preempted all state regulation of utilities, it could adopt the less intrusive course of permitting the states to continue regulating on the condition that they merely consider the federal standards. *See id.* at 765.

Most significantly, the Court noted again that the states could avoid the intrusion effected by regulation under PURPA simply by ceasing the utility regulation governed by the statute. A state could avoid even the obligation to consider federal standards if it "simply stop[ped] regulating in the field." *Id.* at 764. This Court thus distinguished that obligation from "a federal command to the States to promulgate and enforce laws and regulations." *Id.* at 762; *see id.* at 764 (quoting *Hodel*, 452 U.S. at 288, in support of its conclusion that PURPA did not "commandeer" state governmental processes). The Court emphatically denied that its decision in *FERC* "authorize[d] the imposition of general affirmative obligations on the States." *FERC*, 456 U.S. at 769 n.32.

The emphasis on the distinction between federal regulation of voluntary state activity and direct commands requiring the states to undertake action specified by Congress confirms that the majority in *FERC* regarded such commands as constitutionally suspect. Had PURPA prevented the states from ceding utility regulation to the federal government, the outcome in *FERC* might well have been different. The reasoning in *FERC* suggests that the majority would have agreed that a statute compelling the states to enter and remain in a particular area of activity unconstitutionally forces them "to function as bureaucratic puppets of the Federal Government." *Id.* at 783 (O'Connor, J., concurring in the judgment in part and dissenting in part).

3. *South Carolina v. Baker*

Both *Hodel* and *FERC* were decided under the Traditional Function Test of *National League of Cities*. Even after that test was rejected and replaced in *Garcia*, however, this Court

continued to demonstrate concern that Congress refrain from "commandeering" state governmental processes. The opinion in *S.C. v. Baker* devotes a separate section to the claim that the statute at issue in that case impermissibly coerced state activity.[13]

S.C. v. Baker involved a challenge to section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), which removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were in registered form. TEFRA also imposed tax penalties on unregistered private corporate bonds. The plaintiffs argued that the statute unlawfully commandeered state legislative and administrative processes by effectively coercing states into enacting legislation authorizing bond registration and implementing the registration scheme.

The Supreme Court rejected this argument, stating: "That a state *wishing to engage in certain activity* must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *S.C. v. Baker*, 485 U.S. at 514-15 (emphasis added). Once again, the fact that the states could simply withdraw from the regulated field to avoid the imposition of federal requirements distinguished TEFRA from a statute that unconstitutionally commandeered state processes. The clear implication of the decision is that a statute that imposed obligations on the states and precluded them from withdrawing from the field would transgress Tenth Amendment limits.

B. *The Constraint Consistently Recognized by This Court Bars the Coercion Effected by LLRWPAA*

As the foregoing analysis demonstrates, the constitutional principle barring federal commandeering of state governmental

[13] The lengthy discussion of this claim suggests that the Court took it seriously, notwithstanding its ostensible uncertainty whether "the Tenth Amendment claim left open in *FERC* survives *Garcia*." *S.C. v. Baker*, 485 U.S. at 513.

processes transcends the competing theories of federalism manifest in recent Tenth Amendment jurisprudence.[14] Irrespective of the operative Tenth Amendment standard, this Court has consistently recognized that such commandeering offends affirmative constitutional limits on the power of Congress under the Commerce Clause. Moreover, the Court has repeatedly associated such commandeering with laws that preclude the states from ceasing activity they find burdensome because of federal requirements and ceding the field to the federal government.[15]

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[14] Even before the decision in *National League of Cities*, this approach was adopted by three circuit courts reviewing inspection and maintenance requirements imposed under the Clean Air Act. The Court of Appeals for the District of Columbia declared the requirements unconstitutional, reasoning that "the states . . . are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive." *District of Columbia v. Train*, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975), *vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977). Similarly, the Ninth Circuit stated:

> [O]ur constitutional concerns [should not be] interpreted as disfavoring a determination by Congress that the states may regulate certain aspects of commerce . . .only in certain specified ways *if a state chooses to regulate that aspect of commerce at all.*"

Brown v. Environmental Protection Agency, 521 F.2d 827, 840 (9th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977); *see also Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977). These cases are discussed in greater detail in Cortland County's petition for a writ of certiorari in this case.

[15] Lower federal courts have also followed this analysis. *See Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989) (noting that the challenged statute, concerning maximum highway speed limits, only marginally altered the rules governing voluntary state activity), *cert. denied*, 493 U.S. 1070 (1990); *Delaware v. Cavazos*, 723 F. Supp. 234, 245 (D. Del. 1989) ("Delaware has failed to prove that it is being forced to participate in the [Guaranteed Student Loan ("GSL")] Program so that it has no choice but to be bound by all future amendments to the GSL Program. *** As such it follows that the 1987 Amendments do not violate the tenth amendment."), *aff'd mem.*, 919 F.2d 137 (3d Cir. 1990).

The instant challenge represents the first time that this Court has been asked to review the constitutionality of such a law. In enacting LLRWPAA, Congress ignored the constitutional history described above, directly ordered the states to undertake LLRW disposal, and foreclosed the possibility of their withdrawal from the field. Under these circumstances, this Court should expressly affirm the simple rule it has tacitly recognized in its prior decisions and invalidate LLRWPAA as an unconstitutional intrusion on the sovereignty of the states.

Affirmation of this rule is essential to preserve the advantages of the federalist system recognized by this Court in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). The states cannot effectively serve as a check on federal power if Congress can simply dictate a mandatory agenda for the states and compel the states to use their revenues for federal purposes. States will also find it difficult to be "sensitive to the diverse needs of a heterogeneous society," *Gregory v. Ashcroft*, 111 S. Ct. at 2399, if state policy is dictated by the federal government rather than by the local electorate. Nor will states be able to serve as laboratories for experiment if their agencies are conscripted into the national bureaucratic army. *See id.*; *FERC*, 456 U.S. at 775. To preserve the "federalist structure of joint sovereigns," *Gregory v. Ashcroft*, 111 S. Ct. at 2399, this Court should declare that the states' right to avoid federally imposed "general affirmative obligations," where states choose to remain inactive, has been unlawfully violated by the enactment of LLRWPAA.

POINT III

POLITICAL SAFEGUARDS FAILED TO PROTECT THE SOVEREIGNTY OF THE STATES WHEN CONGRESS ENACTED LLRWPAA

Cortland County has argued that this case can, and should, be decided in its favor without applying *Garcia*'s Process Failure Test. The reasoning of *Garcia* and other decisions of this Court amply supports the determination that LLRWPAA violates affirmative constitutional limits on congressional power. If the

Court finds, however, that the Process Failure Test applies in this case, LLRWPAA should nevertheless be found unconstitutional for the reasons set forth below.

A. Garcia *Should Not Be Understood to Write the Tenth Amendment out of the Constitution*

The crux of the decision to overturn *National League of Cities* rested in the *Garcia* majority's frustration with a test that required the Court to make substantive judgments about which governmental functions were "traditional" or "integral" to the operations of the states. *See Garcia*, 469 U.S. at 546-47. Nevertheless, in abandoning *National League of Cities*' test, the Court confirmed that "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority.' " *Garcia*, 469 U.S. at 549 (quoting *EEOC*, 460 U.S. at 269 (Powell, J., dissenting)). The Court acknowledged "that the Constitution's federal structure imposes limitations on the Commerce Clause," *Garcia*, 469 U.S. at 547, but rejected its prior attempt to "carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* at 550. The Court sought instead to articulate a new, content-neutral "approach to defining limits on Congress' authority to regulate the States under the Commerce Clause." *Id.* at 547-48.

The *Garcia* Court thus did not abandon judicial review of Tenth Amendment questions. What the Court rejected was any attempt to resolve such questions by appeal to "freestanding conceptions of state sovereignty." *Id.* at 550. Judicial review of federal statutes remained essential for the protection of the "special and specific position in our constitutional system [occupied by the states]." *Id.* at 556.

In the lower federal courts, however, "the Tenth Amendment has become a 'dead letter' in constitutional law." *Smith v. Butterworth*, 678 F. Supp. 1552, 1557 (M.D. Fla. 1988) (quoting *Michigan v. Meese*, 666 F. Supp. 974, 977 (E.D. Mich. 1987), *aff'd*, 853 F.2d 395 (6th Cir.), *cert. denied*, 488 U.S. 980 (1988)), *rev'd on other grounds*, 866 F.2d 1318 (11th Cir. 1989), *aff'd*, 494 U.S. 624 (1990); *see also Bolin v. Cessna Aircraft Company*, 759

F. Supp. 692, 705 (D. Kan. 1991) (noting "the dormant state of tenth amendment jurisprudence"). Following the decision in *Garcia*, some courts have found it difficult to discern " 'what standard applies to issues' " of federalism and have evidently abandoned the effort to conduct Tenth Amendment analysis. *Butterworth*, 678 F. Supp. at 1557 (quoting *Meese*, 666 F. Supp. at 977). Others have simply concluded that the "Tenth Amendment is no more than a truism . . . ." *Meese*, 666 F. Supp. at 980.

More often, courts have eroded the protection afforded by the Tenth Amendment by failing to develop a concept of the political process that admits genuine possibilities of failure. Such courts, including the courts below in this case, presume that the political system operates properly as long as representatives of the complaining state have not been "inappropriately *denied* the opportunity to contribute input or otherwise participate" in the legislative process. *Nevada v. Burford*, 708 F. Supp. 289, 300 (D. Nev. 1989), *aff'd*, 918 F.2d 854 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2052 (1991). That assumption apparently led the District Court below to conclude that no defect in the political process could be found unless "somebody conspired to keep [a state's representatives] away from Congress." C.A. App. 368-69 (Transcript of Hearing, dated December 7, 1990).[16]

If the political process is conceived, however, so that nothing short of kidnapping a state's representatives to Congress constitutes evidence of malfunction, the Process Failure Test becomes a sham. That test can provide no constraint whatsoever on the actions of Congress if the notion of a political defect has no genuine application. In sum, *Garcia* may not be interpreted as

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[16] *Cf. Equal Employment Opportunity Commission v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990) ("There is no suggestion that Congress surreptitiously enacted any legislation without notice to the State of Vermont."). The Second Circuit's view that the opportunity to participate in the legislative process suffices to defeat any Tenth Amendment claim is reaffirmed in the instant case. *See State of New York v. United States*, 942 F.2d 114, 119-20 (2d Cir. 1991) (relying exclusively on the legislative history of LLRWPAA as evidence of the proper functioning of the political process), *cert. granted*, 60 U.S.L.W. 3294 (U.S. Jan. 10, 1992) (No. 91-543).

the courts below suggest if the test is to fulfill its intended purpose and the political process is to serve its protective function.

B. *Under a Proper Interpretation of* Garcia, *LLRWPAA Must Be Found Unconstitutional*

In applying the Process Failure Test, lower federal courts have not appreciated the relevance of the factors that led this Court to uphold the statute challenged in *Garcia*. As is demonstrated below, those factors identify two conditions that promote the political accountability of Congress. Because the political accountability of Congress is essential to the proper functioning of our political system, the failure to satisfy those conditions – as is the case with LLRWPAA – signals the type of process failure that warrants judicial intervention.

1. *Congressional Accountability Is Essential to the Protective Function of the Political Process*

For the political process to serve its protective function, Congress's accountability for actions that burden the states must be preserved. When Congress knows that it will answer directly to the electorate for burdens it imposes upon the states, a natural political check operates to curb unwarranted intrusion upon the autonomy of the states. When, on the other hand, the structure of a statute enables Congress to evade such responsibility, Congress "circumvents the political check on infringements of state sovereignty." *Texas v. United States* ("*Texas v. U.S.*"), 730 F.2d 339, 354 (5th Cir.), *cert. denied*, 469 U.S. 892 (1984). Evidence that Congress has avoided political accountability in enacting invasive legislation indicates that the political process has failed and the law violates constitutional principles of federalism. *See* Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1180 (1977) ("[C]ongressional interference is prima facie unreasonable if conditions are such that Congress will (or may) not be held (sufficiently) accountable to the electorate for that action.").

a. *Congress's Political Accountability Is Preserved When a Statute Imposes Burdens Equally on Private Entities and the States*

In determining that the internal safeguards of the political process performed as intended in the factual setting of *Garcia*, this Court focused on two key factors. First, the statute reviewed in *Garcia* imposed burdens on private firms and the states alike. *See Garcia*, 469 U.S. at 554 ("[The plaintiff] faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet."). When faced with the prospect of such legislation, states' interests are aligned with those of private business. Congress thus becomes accountable not only to the states but to private industry for the burdens it imposes in enacting the law.

When a statute imposes burdens on the states alone, and lifts such burdens from private industry, the states are placed at odds with their natural political allies. In such circumstances, the states' voice is likely to be far less effective in the national political process. The lobbying efforts of the states in defense of their sovereignty are likely to be overwhelmed by countervailing political (and economic) pressures exerted by national organizations of industries that stand to benefit from the intrusive legislation. *See Garcia*, 469 U.S. at 575 n.18 (Powell, J., dissenting) (noting "the rise of numerous special interest groups that engage in sophisticated lobbying and make substantial contributions to some Members of Congress"); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 16 (1988) ("Congressional representatives increasingly draw their support from nationally organized interest groups, rather than from state political organizations.").

Representative democracy thus cannot be relied upon to protect the interests of the states when the states are deprived of their natural allies any more than it can be trusted to protect the interests of "discrete and insular minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see S.C. v. Baker*, 485 U.S. at 513 (citing *Carolene Products* in concluding

that the political process had functioned properly because South Carolina had not alleged "that it was singled out in a way that left it politically isolated and powerless"). Recognizing the "possible failing" in the political process in cases involving individual rights, the courts strictly scrutinize statutes that involve suspect classifications. Similarly, the judiciary should view with suspicion statutes that single out states for special burdens.

b. *Political Accountability Is Preserved When Congress Bears the Costs of Administration*

In upholding the statute challenged in *Garcia*, the Court noted that "Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened in the area." *Garcia*, 469 U.S. at 555. That comment identifies the second factor that should be considered in applying the Process Failure Test. Where Congress successfully foists all or most of the financial burden of implementing a federal statute on the states, there is reason to believe that the political process may have failed to uphold constitutional principles of federalism. *See* Merritt, *supra*, at 17 (The "technique [of forcing state and local governments to administer national programs at state expense] permits Congress to escape fiscal accountability for its actions.").

The likelihood of process failure is greater still when a federal statute compels the states not merely to finance a regulatory program but to design, administer, and enforce it as well. "[T]he political accountability of Congress remains intact in the absence of direct congressional coercion of state action. If Congress enforces federal policy through its own agencies, the electorate will hold Congress responsible for that policy." *Texas v. U.S.*, 730 F.2d at 354-55. On the other hand, when Congress compels state and local governments to carry out unpopular federal policy, political censure is directed at those governments, while Congress avoids liability for the burdens it imposes. *See id.* at 354; Michelman, *supra*, at 1174.

Congressional compulsion of state legislatures, agencies, and courts not only "blurs the lines of political accountability," *FERC*, 456 U.S. at 787 (O'Connor, J., concurring in the judgment in part and dissenting in part), but enables Congress to achieve ends that "a majority of the national electorate affirmatively might well disapprove if it were required to bear the costs of implementing the national policy." La Pierre, *Political Accountability in the National Political Process – The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U.L. Rev. 577, 660 (1985). Requiring the states to serve as agents of national policy circumvents the political safeguards of federalism provided by obstacles to direct federal enforcement (such as diseconomies of scale and political opposition to the creation of massive federal enforcement bureaucracies). *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1244 (1977).

In sum, when a statute compels the states alone to bear the financial, administrative, and political costs of implementing national policy, the statute reduces Congress's accountability to its constituency. The failure to impose substantial costs on the federal government should therefore be regarded as a good indication of a defect in the political process just as the imposition of such burdens confirms that the process is working. *See Garcia*, 469 U.S. at 555. When Congress neither provides substantial funding for the program it imposes nor permits the states to withdraw from the field in favor of direct federal regulation, a serious constitutional question is raised under the principles of federalism affirmed in *Garcia*.

2. *Congress Avoided Political Accountability in Enacting LLRWPAA*

LLRWPAA lacks both of the characteristics that tend to ensure Congress's accountability for actions adversely affecting the states. It singles out states for the special and onerous burdens of siting, funding, designing, constructing, maintaining, and regulating LLRW disposal facilities. Moreover, in enacting the Take Title Provision of LLRWPAA, Congress severed the interests of the states from those of private LLRW generators by authorizing

those generators to transfer possession of their waste, or liability for it, to states that do not have disposal facilities by 1996.

In addition, by threatening punitive monetary sanctions, LLRWPAA directly compels the states to enact new legislation, promulgate and implement new regulations, and judicially enforce new legal obligations. Compliance with these new requirements has not been supported financially by the federal government — unlike in *Garcia*, where the plaintiffs received over $12 million of federal funding over two fiscal years. Nor has Congress assumed any obligations to administer or enforce the national LLRW disposal program, should the states prefer to withdraw from the field. Indeed, Congress has abdicated its responsibility entirely by transferring to the states the full obligation to dispose of LLRW, including all but a few categories of federally generated LLRW. *See* 42 U.S.C. § 2021c(a)(1)(B).

By compelling the states to undertake LLRW disposal, Congress is in fact escaping responsibility for the enactment of LLRWPAA. As the record in this case demonstrates, Congress has successfully blurred the lines of political accountability by requiring the states to administer unpopular siting programs. Protest — some of it so large scale and disruptive as to require mass arrests — has been directed at state and local officials, *see* J.A. 67a-69a, 81a-82a, instead of at the members of Congress who mandated the involuntary activity. Because the state cannot lawfully refrain from its siting activities, despite political pressure to do so, citizens are left "feeling that their representatives are no longer responsive to their needs." *FERC*, 456 U.S. at 787 (O'Connor, J., concurring in the judgment in part and dissenting in part).

The political checks that operate when regulation applies to states and private entities alike and when Congress bears the ultimate financial and administrative costs of its actions are therefore wholly absent in this case. The features of the political system that ordinarily ensure that Congress will respect the sovereignty of the states have been successfully evaded in the enactment of LLRWPAA. Under these circumstances, LLRWPAA should be found to fail the Process Failure Test for compliance with constitutional principles of federalism and should be declared unlawful and void.

POINT IV

THE "TAKE TITLE" PROVISION OF LLRWPAA SHOULD BE FOUND UNCONSTITUTIONAL, EVEN IF LLRWPAA'S DISPOSAL MANDATE IS UPHELD

Cortland County maintains that all of LLRWPAA's direct federal commands to the states violate constitutional principles of federalism. Nevertheless, the Take Title Provision, in particular, is so extreme and unprecedented a punitive measure,[17] that it warrants special attention from this Court.

The Take Title Provision threatens the states with immeasurable, and potentially enormous, liability. Congress has imposed this liability on the states despite the fact that they cannot control the production of the commercially generated LLRW and therefore cannot require the generators to adopt waste reduction measures that would limit potential costs to the states. Cortland County knows of no other statute in the history of this nation that attempts to impose such liability or to compel the transfer of dangerous waste to the states.

Contrary to the decision of the Second Circuit, *see State of New York v. United States*, 942 F.2d at 120-21, the cases cited in its opinion involving the contractual transfer of waste, *see General Electric Uranium Management Corp. v. United States Department of Energy*, 764 F.2d 896 (D.C. Cir. 1985); *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F. Supp. 850 (N.D. Ill. 1990), provide no authority for the Take Title Provision. In *General Electric*, the Secretary of Energy was permitted, not compelled, to contract with private parties who sought to transfer nuclear waste to the Department of Energy;

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[17] *See* 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston) ("It is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that."); 131 Cong. Rec. H13,077 (daily ed. Dec. 19, 1985) (statement of Rep. Markey) ("I cannot recall any statute which has ever sought to impose such a liability on States. The statute may not pass a constitutional challenge . . . .")

and the private parties, not the government, were fully responsible for the associated costs. *Commonwealth Edison* involved two private parties who voluntarily entered a contract providing for transfer of the waste. New York has never agreed to take possession of, or liability for, privately generated LLRW.[18] The Take Title Provision, unlike a contract, effects a forcible transfer against New York's will.

The extremity of the Take Title Provision has been recognized even by Congress's own legal advisers. Prior to passage of LLRWPAA, the Congressional Research Service found that the provision raised questions under the Tenth Amendment. *See* 131 Cong. Rec. H13,077 (daily ed. Dec. 19, 1985) (statement of Rep. Markey). The federal respondents in fact concede that "this provision, if actually triggered in a particular instance in the future, might raise further federalism concerns."[19] *See* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 25. For these reasons, as well as those articulated in Points I-III of this brief, the Take Title Provision provides the clearest basis for declaring LLRWPAA unconstitutional.

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[18] The alleged "exchange" repeatedly invoked by the federal respondents, *see* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 3, 10, 16, 18, whereby Congress assigned disposal responsibility to the states in return for the right, as a member of a compact, to exclude LLRW generated outside the compact region, has no bearing on this case. New York is not a member of a compact and has not surrendered any element of its sovereignty in exchange for exclusionary rights.

[19] The federal respondents hint, without actually claiming, that the constitutionality of the Take Title Provision is not ripe for review at this time. *See* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 19 n. 23, 25. Cortland County respectfully suggests that New York should not be forced to wait until it is sued for damages under LLRWPAA before raising the instant claim. In any event, the respondents at best raise a question of fact that cannot be settled on the present record. If this Court is seriously troubled by the issue of ripeness, which it should not be, the case should be remanded for a hearing on the relevant factual questions.

CONCLUSION

For the reasons set forth above, Cortland County respectfully requests that the decisions of the courts below be reversed and that LLRWPAA be declared unconstitutional and void.

Dated: New York, New York
February 12, 1992

Respectfully submitted,

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Nos. 91-543; 91-558; 91-563

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IN THE

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER STATE OF NEW YORK

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(1779—LC5-588—1992)

Question Presented

Whether Congress, consistent with the limits imposed by the Constitution and especially the Tenth Amendment, may compel a State to "be responsible for" and develop a plan for the disposal of low-level radioactive waste produced by private, state, and some federal generators within the State's borders, and may require the State to take title to, assume possession of, and be legally liable for such waste if it fails to develop such a plan.

List of Parties in Proceeding Below

With the exception of Ivan Selin, James B. Busey, and William P. Barr, the parties listed on the caption are identical to those in the proceeding below. Mr. Selin has been substituted for Kenneth M. Carr as Chairman of the United States Nuclear Regulatory Commissioner. Mr. Busey has been substituted for Samuel K. Skinner as (Acting) Secretary of Transportation. Mr. Barr as been substituted for Richard Thornburgh as United States Attorney General.

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The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 942 F.2d 114. The opinion of the district court (Pet. App. 18a-26a) is reported at 757 F.Supp. 10.

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari filed in this matter by the State of New York (No. 91-543).

Statement of Grounds for Jurisdiction

Invoking federal jurisdiction under 28 USC §§ 1331, 1337, 1346, 2201 and 2202, petitioner State of New York and other petitioners brought this suit in the United State District Court for the Northern District of New York. On December 7, 1990, the District Court granted defendants' motion to dismiss the complaint.

On plaintiffs' appeals, the Court of Appeals for the Second Circuit on August 8, 1991 entered a judgment and opinion affirming the District Court's order.

Invoking this Court's jurisdiction under 28 USC § 1254(1), petitioner State of New York filed its petition for a writ of certiorari on September 30, 1991. Certiorari was granted by the Court on January 10, 1992.

Constitutional and Statutory Provisions Involved

United States Constitution, Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Article IV, § 4:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USC §§ 2021b-2021j):

See Appendix.

Nos. 91-543; 91-558; 91-563

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER STATE OF NEW YORK

Statement of the Case

This appeal addresses the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240 (the 1985 Act, LLRWPAA), incorporated in 42 USC § 2021b *et seq*. The statute was a congressional effort to deal comprehensively with one of the most difficult problems of nuclear technology: the secure disposal of low-level radioactive waste. In this brief, the State of New York will argue that this statute, though enacted by a well-intentioned Congress, is constitutionally deficient in its imposition of uniquely intrusive affirmative obligations upon sovereign state governments.

Since 1978, only three commercial sites have been available for low-level radioactive waste disposal in the United States: Beatty, Nevada; Barnwell, South Carolina; and Hanford, Washington. 1985 U.S. Code Cong. & Admin. News, pp 3005-3006. Safety concerns and plans to limit and ultimately discontinue waste disposal at these facilities prompted Congress to pass the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. 96-573 (the 1980 Act).

That legislation set forth a federal policy that each State, in its capacity as sovereign State, be responsible for providing for the disposal of low-level radioactive waste generated within its borders by private, state, and certain federal producers.[2] It did not, however, require a State to accept such responsibility. The 1980 Act also encouraged States to form interstate compacts to meet these duties and specifically provided that compact States might bar use of compact facilities for the disposal of waste generated outside the compact region after January 1, 1986. Pub. L. 96-573, §§4(a)(1), 4(a)(2)(B).

[2]Low-level radioactive waste was defined in the 1980 Act as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954." Pub. L. 96-573, § 2(2).

While a majority of States joined or proposed to join compacts in the years following the passage of the 1980 Act, no new state or regional disposal facilities were projected to become operational until the early 1990s. Consequently, the exclusion provision of the 1980 Act posed a problem: congressional ratification of proposed compacts whose members operated existing disposal sites (Washington, Nevada, and South Carolina) would have denied access to the only possible disposal sites to all waste from States which were not in those compacts. Accordingly, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USC §§ 2021b-2021j) to permit ratification of proposed compacts, spur further compact formation, and grant all States continued limited access to existing disposal sites.[3]

The 1985 Act differed from its predecessor in several significant respects. It directly assigned to the States in their sovereign capacity responsibility[4] for the disposal of low-level radioactive waste.[5] It conditionally guaranteed access to dis-

[3]Title I of Public Law 99-240, 99 Stat 1842, constituting the LLRWPAA, was incorporated in 42 USC §§ 2021b-2021j. Public Law 99-240, Title II, 91 Stat 1859, constituting the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, granted Congress's consent to seven proposed regional compacts.

[4]Section 3(a) of the 1985 Act (42 USC § 2021c[a][1]) provides that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State . . . ."

[5]The 1985 Act defines low-level radioactive waste (LLRW) as radioactive material that: (a) is not "high-level" radioactive waste, spent nuclear fuel, or by-product material as defined at 42 USC § 2014(e)(2); and (b) is classified as LLRW by the Nuclear Regulatory Commission. Nationwide, about 90% of the volume and 97% of the total radioactivity of LLRW for which the 1985 Act assigns disposal responsibility to the States comes from nuclear power plants and other industrial sources; the remainder is generated by research laboratories, hospitals, and medical centers.

The Act requires the States to be responsible for disposal of Class A and Class B waste (containing radioactivity which will diminish to a level acceptable for inadvertent exposure within 100 years [10 CFR § 61.7(b)(4)]), and Class C waste (requiring protection against inadvertent exposure for 500 years (10 CFR § 61.7(b)(5)]). Class C Waste comprises less than 1% of volume but constitutes over 65% of the radioactivity of all LLRW.

posal sites in Washington, Nevada, and South Carolina for low-level radioactive waste from all States between January 1, 1986 and December 31, 1992, and set forth a detailed transition scheme, with incentives and penalties, designed to encourage compact formation and force disposal site development. 42 USC § 2021e. By specific dates within that period, States and compacts were directed to comply with a number of regulatory requirements, including ratification of compact legislation or indication of an individual State's intent to develop a separate low-level waste disposal facility for waste generated in-state, development of a siting plan, and application for a facility license to the Nuclear Regulatory Commission or appropriate agency of an agreement State (2021e[e][1]). Failure to meet this schedule might result in added surcharges upon waste generators by disposal site operators, denial of access to the Washington, Nevada, and South Carolina sites, and loss of certain surcharge rebates to the States (2021e[d], [e]).

The most novel and intrusive of the affirmative directives in the 1985 Act, however, was set forth in 42 USC § 2021e(d)(2)(C):

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

With this so-called "take title" provision, Congress decisively altered the method and impact of prior legislation regulating low-level radioactive waste disposal through encouragement and voluntary incentives. The new Act coupled "responsibility" for such waste with a mandate that each State develop and carry out a program for the disposal of waste generated within its borders by private and other generators, including some federal generators. It strengthened this mandate through the command that States assume ownership and possession of, as well as legal liability for, such waste if they fail to comply with the federal scheme and timetable of regulation.

New York State's congressional delegation participated in the enactment of both the 1980 and the 1985 Acts. In addition, various national lobbying groups, including the National Governors' Association, contributed proposals and advice to Congressional committees in the early stages of each enactment.

To comply with the deadlines and other constraints of the 1985 Act, New York State enacted Chapter 673 of the Laws of 1986. Among its many provisions, this legislation called for (1) the promulgation of standards of site selection and disposal of low-level waste by the New York State Department of Environmental Conservation; (2) the creation of a Siting Commission to select a disposal site and methodology; and (3) construction of a disposal facility by the New York State Energy Research and Development Authority.[6] To date, the Siting Commission created under Chapter 673 has identified five potential disposal sites within the State. Three of these sites are located in Allegany County; the remaining two sites are in Cortland County.

[6]Laws of New York 1986, chap. 673 was subsequently amended by Laws of New York 1990, chap. 368 (providing that title to low-level radioactive waste shall at all times remain in the generator of such waste—even after such time as the waste has been accepted at the disposal facility), and Laws of New York 1990, chap. 913 (expanding membership and tasks of the Siting Commission).

In February, 1990, the State of New York, together with the Counties of Allegany and Cortland, commenced an action in the United States District Court for the Northern District of New York against various federal defendants, seeking a declaration that the LLRWPAA's imposition of broad new affirmative duties upon the States violated the Tenth and Eleventh Amendments, as well as the Due Process and Guarantee Clauses of the United States Constitution. The States of Washington, Nevada, and South Carolina subsequently joined the action as intervenors in support of defendants.

The District Court (Cholakis, J.) granted defendants' motion for summary judgment and dismissal of the complaint in a bench decision issued in December, 1990. Reciting this Court's statement in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), that "judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to inquiry of whether the political process has failed," the district court held that Tenth Amendment review was proper only to discern "problems which may have had an untoward effect on a particular law's enactment or its subsequent political review" (Pet. App. 25a). Finding that the 1985 Act imposed no restriction on New York's "ability to operate in the political arena and to challenge the law," the court found judicial review unwarranted on grounds of a failure of the political process (Pet. App. 25a).

While recognizing that *Garcia* left open the possibility of judicial review of the substantive impact of federal action under the Commerce Clause in exceptional cases, the court ruled that such exceptions arose only "when constitutional equality among the states has been jeopardized" by the federal act (Pet. App. 23a). Finding no such jeopardy, nor other grounds for constitutional attack, in the 1985 Act, the court dismissed the State's and counties' complaint (Pet. App. 26a).

On appeal, the Court of Appeals for the Second Circuit affirmed. In its decision, the court observed that, in light of Congress's traditional role in nuclear regulation, "appellants undertake an unusually burdensome task" in challenging the 1985 Act (Pet. App. 10a). The court held that "both the 1980 Act and its 1985 Amendments are paragons of legislative success" (Pet. App. 13a), and rejected any claim that the Act or its take title provision was the product of a failure in the political process.

The court found unpersuasive appellants' argument that *Garcia* permitted review of congressional mandates, such as the take title provision, which significantly limited the States' role in the federal system and thereby altered the federal constitutional structure. While the court neither confirmed nor denied that such review is permissible, it endorsed the district court's holding that such review, if permissible, should consider only whether the federal act upset the "equality in dignity and power" among the several States (Pet. App. 15a; citing *Coyle v Oklahoma*, 221 US 559 [1911]). The 1985 Act, it held, had no such effect. "In sum," the court noted (Pet. App. 16a),

> we are satisfied that the take title provision does not undermine the constitutional structure. Neither does it violate principles of federalism as recently explained in *Garcia;* and '[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated.' *[South Carolina v] Baker*, 485 U.S. [505 (1988)] at 513 (emphasis in original).

The court also dismissed challenges to the Act based upon the Eleventh Amendment and the Guarantee Clause (Pet. App. 16a-17a), and affirmed the grant of summary judgment to defendants.

New York, Allegany and Cortland filed separate petitions for writs of certiorari to this Court on September 27, October 2, and October 3, 1991. The petitions were consolidated and certiorari was granted on January 10, 1992.

SUMMARY OF THE ARGUMENT

This Court in *Garcia*, while stating that in most instances it would not entertain Tenth Amendment challenges to federal acts, recognized that statutes impairing the constitutional structure might require review but declined to identify when such review was appropriate. We argue in the first point that this case, where the challenged Act imposes unconditional affirmative obligations on States and only on States, presents the quintessential situation where judicial review is needed under the Tenth Amendment and the principles of federalism inherent in the federal constitutional structure. Unlike the LLRWPAA, the Fair Labor Standards Act at issue in *Garcia* applied alike to private entities and States and imposed duties where the States had voluntarily undertaken the activity addressed by the federal regulatory scheme. Neither *Garcia* nor cases reviewed by the Court there involved laws enacted under the Commerce Clause to compel state governments to engage in a particular activity without their consent. While this Court has never squarely addressed this type of law, it has on a number of occasions expressed serious reservations about the constitutional authority for Congress to take such an action. The opportunity for the State to act through its legislature in deciding whether to participate in a federal program is an essential element of the structure of the federal system. Since the sovereignty of States, which is critical to the preservation of the federal system, is severely compromised absent such an opportunity, it would appear that this Court in *Garcia* must have contemplated review of this type of act by the courts.

We also argue that if this Court's holding in *Garcia* cannot be interpreted to permit such review, that holding should be clarified or modified to authorize unequivocally substantive Tenth Amendment review of federal acts which, like the LLRWPAA, impose significantly intrusive and unavoidable demands solely upon the sovereign States in the furtherance of a federal regulatory scheme.

In Point II we argue that, upon such substantive review, the imposition by Congress of unconditional affirmative duties upon States, and solely on the States, for the decentralized disposal of low-level radioactive waste under the LLRWPAA violates the Tenth Amendment and the Guarantee Clause of the Constitution.

The present Act differs materially from all federal actions previously reviewed by the Court under the Tenth Amendment. In the past Congress has either applied legislative standards under the Commerce Clause alike to the States and to non-governmental entities or has induced States to undertake desired activities through threat of preemption or the commitment of federal funds. The present Act is in sharp contrast. It simply declares that the States are responsible for the permanent disposal of most specified low-level radioactive waste generated within their borders in accordance with various federal requirements and that if all requirements are not met by January 1, 1996, the States will be required to take title to all such waste proffered them and be liable for any damages incurred by private generators where the State has failed to take possession. In this way, the Congress has commandeered the States' sovereign authority to deal with a national concern and deprived the States of any independent opportunity to decide whether to participate in such a federally mandated program. This means of dealing with a problem of admitted national concern is unacceptable because it totally undermines the existence of States as independent sovereign entities.

Acceptance of such an approach would relegate States to a status of mere departments of the federal government.

Finally, we argue that, contrary to the position of the federal government below, the take title provision cannot properly be severed from the rest of the Act. The proponents of the 1985 Act viewed the threat of the take title provision as essential to assure States' compliance with the other provisions of the Act. Thus, it is unrealistic to assume Congress would have enacted the LLRWPAA without that provision. Accordingly, the entire 1985 Act must be declared unconstitutional.

ARGUMENT

POINT I

This Court should subject the 1985 act to substantive review under the Tenth Amendment.

Although this Court determined in 1985 that the primary protection of state sovereign interests in the federal system lay with the federal political process, *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), it stated then that its holding did not preclude all substantive review of Congressional action against Tenth Amendment challenges. At that time, the Court chose not to delineate what particular issues might remain open to such review. The LLRWPAA presents such an issue.

In *Garcia*, the Court was asked to determine whether the Fair Labor Standards Act (FLSA), with its overtime, recordkeeping, and other requirements, was applicable to publicly owned mass transit systems, just as it was to other employers in the private sector. The San Antonio Metropolitan Transit Authority argued that its status as a public authority performing a "traditional government function" vested it with

constitutional immunity from the Act's provisions under *National League of Cities v Usery*, 426 US 833 (1977).[7] This Court did not agree. Though it recognized the enduring quality of state sovereign authority in the federal system (469 US at 549), the Court specifically rejected the notion that "free-standing conceptions of state sovereignty" could be employed to differentiate among various state affirmative acts for purposes of Commerce Clause analysis. Such conceptions, the Court observed, had proved analytically inadequate and had too often provided past courts with the opportunity to intrude into States' affairs (469 US at 546, emphasis added):

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the *States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be*. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. "The science of government . . . is the science of experiment," *Anderson v Dunn*, 6 Wheat. 204, 226 (1821), and the States cannot serve as laboratories for social and economic experiment, see *New State Ice Co. v Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society had left in private hands.

[7] Under *National League*, a federal act violated the Tenth Amendment if it (1) regulated "states as states"; (2) addressed indisputable attributes of state sovereignty; (3) directly impaired States' operations in traditional government functions; and (4) did not reflect a federal interest which justified State submission to the federal action. *Hodel v Virginia Surface Mining & Rec. Assn.*, 452 US 264, 287-288 n 29 (1981).

The *Garcia* holding, therefore, expressed this Court's dissatisfaction with the prospect of ongoing judicial assessment of whether a State's activity in the modern economy was a sovereign one. Once a State has chosen to act in a sphere subject to federal regulation, the State's susceptibility to such regulation was a matter to be left, in a majority of cases, to the federal legislative and political process.

While this majority view in *Garcia* induced vigorous and well-reasoned dissents,[8] both the context and the express terms of the holding make it clear that even the majority was unwilling to permit unconstrained federal regulation of States through the Commerce Clause. Neither *Garcia* nor the cases reviewed there addressed the propriety of federal laws which, under the powers of the Commerce Clause, compelled state governments to engage in a particular activity against their will; which limited the States' right to withdraw from activity in a particular field; or which required States to participate as regulatory agents in a scheme of federal regulation. Moreover, this Court in *Garcia* expressly recognized that additional Tenth Amendment protection might be available to the States in cases where federal action, though not the product of a defective political process, was more intrusive than that reviewed in *Garcia* or its antecedents, stating (469 US at 556):

> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See *Coyle v Oklahoma*, 221 U.S. 559 (1911).

[8]*See*, 469 US at 557 (Powell, J., dissenting), 469 US at 579 (Rehnquist, J., dissenting), and 469 US at 580 (O'Connor, J., dissenting).

The benefits and importance of the constitutional structure referred to in *Garcia* have been set forth by this Court in numerous opinions.[9] Most recently, in *Gregory v Ashcroft*, ___ US ___, 111 S Ct 2395, 2399-2400, 115 L Ed 2d 410, 422-423 (1991), the Court stated:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it

[9]*See, e.g., Lane County v Oregon*, 74 US 71, 76 (1868) ("[I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved."); *Texas v White*, 74 US 700, 725 (1868) ("Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provision, looks to an indestructible union, composed of indestructible States."); *Coyle v Oklahoma*, 221 US 559, 567 (1911) (" 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."); *Fry v United States*, 421 US 542, 557 (1975) (Rehnquist, J., dissenting) ("Both [the Tenth and the Eleventh] Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation."); *Federal Energy Regulatory Commission (FERC) v Mississippi*, 456 US 742, 777 (O'Connor, J., dissenting in part) ("State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes.")

> increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . .
>
> Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . .
>
> . . . In the tension between federal and state power lies the promise of liberty.

These advantages inherent within the constitutional structure of the federal system are of fundamental importance to our nation and its citizens. They reflect the clear intent of the Constitutional Framers; [10] they have been a focal point of high regard for the American constitutional system for two centuries.[11]

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[10] *See*, the historical précis contained in Justice O'Connor's partial dissent from the majority opinion in *Federal Energy Regulatory Commission (FERC) v. Mississippi*, 456 US 742, 795-796 (1982). *See also, Garcia v. San Antonio Metropolitan Transit Authority*, 469 US at 568-579 (1985) (Powell, J. dissenting); *EEOC v. Wyoming*, 460 US 226, 265 (1983) (Powell, J., dissenting); *National League of Cities v. Usery*, 426 US 833, 842-845 (1976) (Rehnquist, J.). In light of these thorough discussions of the subject, we shall not essay in this brief an historical treatment of the Framers' or this Court's views of these federalist principles.

[11] *See, e.g., The Federalist*, Nos. 1, 2, 9, 14, 37, 39, 40, 43, 45, 46; Jefferson, Letter to Gideon Granger, August 13, 1800; Tocqueville, *Democracy in America* 158-163 (Anchor Books, 1969); Lippman, *The Essential Lippman* 220-221 (1963). Scholarly literature addressing the importance of some or all aspects of the federal system is vast; significant (Footnote continued on next page.)

While the precise extent of the Court's concern for the constitutional structure has never been fully articulated, at least two features of that structure have repeatedly been the focus of review of federal action under the Commerce Clause by the Court: (1) the ability of state governments to make independent policy choices about whether to engage in state government activities, and (2) the power of state governments to enact or decline to enact legislation. Several significant Tenth Amendment cases decided by this Court in recent years clearly reflect these concerns. In *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 US 264 (1981), this Court considered a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act of 1977, which established a two-stage program for the nationwide regulation of surface coal mining. The Act empowered the Department of the Interior to promulgate and enforce regulations; States were afforded the opportunity to operate their own regulatory programs so long as such programs complied with federal regulatory standards. 452 US at 268-272. Reversing a lower court determination that the Act violated the Tenth Amendment under *National League*, this Court held unobjectionable the Congress's power to displace state regulation of private activities affecting interstate commerce in a way which "curtails or prohibits" the States' prerogatives to make legislative choices. 452 US at 290. It noted (452 US at 280) that the Surface Mining Act merely established

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(Footnote continued.)

recent statements include Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489 (1954); Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S.Ct. Rev. 81; Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1 (1988); Friendly, Federalism: A Foreword, 86 Yale L.J. 1019, 1034 (1977); Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985); Diamond, *The Federalist* on Federalism: "Neither a National nor a Federal Constitution, but a Composition of Both", 86 Yale L.J. 1273 (1977); La Pierre, Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues, 80 Nw. U.L.Rev. 557, 635ff (1985).

> a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

This Court in *Hodel* distinguished the Surface Mining Act's establishment of federal minimum regulatory standards upon private activity in the States from the imposition of regulatory obligations upon state governments, which would raise more difficult constitutional questions (452 US at 288):

> [T]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.

While the Commerce Clause permitted limitations on States which chose to regulate a field concurrently regulated by the federal government, Congressional acts compelling States to regulate remained constitutionally suspect.[12]

[12]In *Hodel*, the Court specifically distinguished three prior cases where a federal regulation appeared to commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. 452 US at 288-289. *See, e.g., Maryland v. EPA*, 530 F2d 215 (4th Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 US 99 (1977) (*per curiam*) (EPA regulations compelling states to establish and fund automobile inspection programs under penalty of criminal and civil sanctions upon non-complying States violate Tenth Amendment); *Brown v. EPA*, 521 F2d 827 (9th

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This holding in *Hodel* was reaffirmed in *FERC v. Mississippi*, 456 US 742 (1982), in which the Court addressed a Tenth Amendment challenge to certain sections of the Public Utility Regulatory Policies Act of 1978 (PURPA). Among that Act's many provisions were requirements that state utility regulatory authorities (1) consider implementation of certain specific regulatory standards regarding electricity and gas services; (2) hold public hearings on such standards; and (3) implement rules promulgated by FERC for encouraging development of cogeneration facilities. The Act also provided that private parties could compel consideration of the federal standards through a state court action.

Noting at one point that the case appeared to present an issue of first impression—the review of legislation in which "the Federal Government attempts to use state regulatory machinery to advance federal goals," 456 US at 759—this Court in *FERC* upheld each of these provisions against Tenth Amendment attack. While deeming the requirements that States hold public hearings and consider implementation of certain regulatory practices to be merely a minor infringement upon state sovereignty, the Court held that even this infringement could be avoided by States which chose to decline to regulate the field. 456 US at 764. It further stated (456 US at 765-766):

(Footnote continued.)

Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 US 99 (1977) (*per curiam*) (same); *District of Columbia v. Train*, 521 F2d 971 (D.C. Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 US 99 (1977) (*per curiam*) (same). *Contra, Pennsylvania v. EPA*, 500 F2d 246 (3rd Cir 1974). After the Supreme Court had granted *certiorari* in three EPA cases in 1976, the EPA rescinded some of the regulations and conceded that others were invalid unless modified. The Court consequently vacated and remanded these cases without ruling on the constitutionality of the regulations. 431 US at 103-04.

> While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence" [citations omitted], and do not impair the ability of the States "to function effectively in a federal system." [citations omitted.]

Thus *FERC*, like *Hodel*, clearly suggested that federal compulsion of a state action under the Commerce Clause remained constitutionally suspect insofar as it was unrelated to an activity which the State chose to undertake or continue.

While the majority in *South Carolina v Baker*, 485 US 505 (1988), left open the possibility that the teachings of *FERC* on this issue might to some degree have been modified by *Garcia* (485 US at 513), this Court did not address the issue as such because it was unnecessary to do so. The federal act challenged in *Baker*—section 310(b) (1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)—removed federal income tax exemptions for interest earned on new bonds issued by state and local governments unless the bonds were issued in registered form. Designed to provide a strong incentive to encourage governments to issue registered bonds, this portion of the Act merely provided that bondholders of States which did not comply with the federal regulatory scheme would forfeit the tax benefits previously extended to them by the federal government. As this Court noted in rejecting a claim that the effect of TEFRA was to commandeer South Carolina's legislative process (485 US at 514-15, emphasis added):

> Such "commandeering" is . . . an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That *a State wishing to engage in certain activity* must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Once again, the Court recognized that permissible federal mandates to States as sovereigns were always linked to a State's willing participation in the particular activity involved.

It is clear from this brief review of *Baker*, *FERC* and *Hodel*, as well as an examination of the EPA cases, that federal regulation of voluntary state activities based upon the Commerce Clause or federal inducements to States to take action have engendered a lesser degree of constitutional concern than the imposition of affirmative duties on the States which, by requiring States to initiate new programs or continue to be involved in programs that they had already undertaken, curtail their ability to make independent policy or legislative choices. In this respect, the differences between the LLRWPAA and each of the federal Acts examined by this Court in *Hodel*, *FERC*, *Garcia*, and *Baker* are significant. Unlike the FLSA and TEFRA, which extended to state and local governments various "generally applicable regulations" (*Baker*, 485 US at 515), the 1985 Act imposed various requirements solely upon the States as sovereigns. Unlike the regulatory activities urged upon the States under the Surface Mining Act or PURPA, which could be avoided by a State's decision to withdraw from the regulatory field, the 1985 Act imposes upon the States an unconditional affirmative obligation to participate in the federal regulatory scheme. That type of obligation seriously impinges on the basic constitutional structure by divesting the States of the decision-making authority inherent in our federal system. Accordingly, legislation such as the LLRWPAA must

be subject to review to protect the States' essential role in the federal system. We believe that review comes within the scope of *Garcia*.

The opportunity for the State to act through its legislature in determining whether or not to participate in a federal program is an essential aspect of the structure of the federal system. Without such opportunity that structure is severely compromised. Absent the ability to abstain from administering federal regulatory schemes which invoke the States' sovereign powers, state governments may be forced to become unwilling subordinate agents to Congressional dictates. Without the power to choose alternative actions, States are sharply constrained in their function, noted in *Garcia* and repeated in *Ashcroft*, to serve as laboratories for social and economic experiment, or "to engage in any activity that their citizens choose for the common weal." 469 US at 546. Without such choices, not only may States be compelled to participate in federal regulatory schemes by inescapable congressional fiat, but they may also be obliged to assume responsibility for the full financial and administrative burden of such schemes.

Consequently, if this Court were to find that the language of its *Garcia* ruling did not contemplate Tenth Amendment review of laws such as the 1985 Act, we urge the Court to clarify or modify *Garcia* to establish the propriety of such review. As we have set forth *supra*, the federal framework incorporated within the Constitution provides the fundamental structure for balanced and effective representative government both in the States and at the federal level. This Court's power to review federal action affecting this structure, acknowledged since *Marbury v Madison*, (1 Cranch) 137 (1803), is as vital a safeguard to national liberty as the text of the Constitution itself. Unless that power is exercised by this Court in the present context, the opportunity of the Congress to compel involuntary state activity and to commandeer state govern-

ment resources and operations through the Commerce Clause would appear to be unlimited.

POINT II

The 1985 Act should be declared unconstitutional.

A.

Upon substantive review, this Court should find that the 1985 Act impermissibly alters the balance of federal-state relations by its imposition of affirmative obligations for the disposal of low-level radioactive waste upon the States and should declare the Act unconstitutional in its entirety.

The 1985 Act differs fundamentally from all federal actions previously reviewed by this Court under the Tenth Amendment. While it is not the first congressional act which seeks to have the States exercise their sovereign powers for federal purposes, it appears to be the first to impose upon each State an affirmative duty to exercise sovereign powers of legislation and other action within the State, in accordance with a federal regulatory scheme, without the State's consent, and with no option for the State's withdrawal from the role of regulator or actor in the field. The imposition is threefold: the broad assignment to the States of "responsibility" for a federal regulatory concern; the establishment of parameters and a timetable for compliance with that assignment of action; and the attachment of draconian, affirmative obligations on the States for a refusal or failure to meet that regulatory responsibility or timetable.[13] By congressional fiat and without

[13]The constitutional implications of these obligations were not lost upon commentators at the time of the Act's passage. As one reviewer noted:

> Certainly, the Congress, as is each state, is free to exercise its powers to designate sites and to construct and operate low-level waste disposal facilities. But for the Congress to mandate that the states must undertake the burden of providing waste facilities without any provision for federal funding or fact obligations,

(Footnote continued on next page.)

regard for current or past state desire or practice, the Act declares individual state governments to be responsible for a problem which Congress has determined to be of national concern.

Moreover, the duties imposed upon the States under the Act are neither minimal nor short-lived. Instead, they require the States to undertake a commitment to provide for permanent disposal of hazardous materials—a commitment which by its terms will endure for five centuries. The Act provides States with no opportunity to decline or withdraw from this obligation.

Furthermore, the Act attributes to the States responsibility for waste problems which are principally caused by private generators regulated by the federal government. Although state power plants, hospitals, and research facilities generate low-level radioactive waste, and although agreement States may voluntarily impose some regulations upon certain radioactive materials and wastes within their borders, the federal government nonetheless retains firm control over health and safety regulation of nuclear power and by-products which are responsible for the overwhelming majority of low-level radioactive wastes. The ability of the States to limit the creation of radioactive wastes for which the Act makes them responsible, therefore, is sharply constrained.

(Footnote continued.)

liabilities, or any other sanctions imposed under federal law may raise 10th Amendment problems. There does not appear to be pertinent judicial precedent that has upheld in the face of 10th Amendment objections a federal mandate as intrusive on state sovereignty as the one at issue here.

Memorandum from the Congressional Research Service to the Subcommittee on Energy Conservation and Power, House Committee on Energy and Commerce, "Constitutional Issues Raised By the Imposition of Liabilities on the State Under a Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980," December 16, 1985.

Most significantly, under the 1985 Act, after January 1, 1996, States which do not provide for disposal of low-level radioactive waste generated within their borders are made responsible by the Federal government for all such waste generated by private producers and some federal producers throughout the State. In a manner to our knowledge unprecedented, the take title provision transfers by congressional edict the ownership obligations of federal and private parties to the State. States are compelled by this provision to exercise their sovereign powers as agents of federal regulation, not as a consequence of reflection and decision by state legislative and executive bodies, but by fiat of the Federal government. These duties and obligations are not imposed upon the State in its capacity as a generator of low-level waste like any other economic actor.[14] Rather, they are imposed solely in light of the State's sovereign capacity.

These features of the Act pose a sharp challenge to the constitutional structure of the federalist system and deprive States and their citizens of the various advantages assured by that structure. States and state citizens are denied the opportunity to decide, through their state governmental process, whether state fiscal and legislative resources should be devoted to the problem of low-level waste disposal. Faced with the imminent burden of the take title provision, States are limited in their ability to experiment with alternative systems of waste disposal; pressed by the deadline of that provision,

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[14]The New York State Power Authority currently operates two nuclear power plants within the State, and waste materials are produced at various state hospitals and research facilities. Moreover, with federal encouragement the State voluntarily participated in an experimental program for nuclear waste management at West Valley, New York between 1963 and 1975; ultimately the program was terminated because of health and safety concerns. However, at no time prior to the 1980 and 1985 Acts was the State's role as a generator or manager of low-level waste an obligatory burden imposed by the federal government. That role was determined by the State Legislature and Executive, in the exercise of their sovereign authority.

they are forced to adopt current technologies at a pace set by the federal Congress. Though States are left with some appearance of flexibility in choosing the details of compliance with federal demands—e.g., whether or not to join a compact; how such a compact might be organized; whether or not a compact should exclude wastes from non-member States; etc.—they are driven to these decisions not by the independent exercise of spirited legislative investigation and debate, but by the irresistible dictates of the national government.

If the Commerce Clause may be employed to authorize such mandates, then the "healthy balance of power between the States and the Federal Government" described in *Ashcroft* (111 S Ct at 2400; 410 L Ed 2d at 422) cannot prevail. Nor can there continue that "tension between federal and state power [in which] lies the promise of liberty." *Id.* In their stead stands a constitutional structure which, by permitting the States to become mere departments[15] of the federal government and

[15]As the District of Columbia Circuit noted in its instructive opinion in *District of Columbia v Train*, 521 F2d 971, 992 (D.C. Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v Brown*, 431 US 99 (1977) (*per curiam*) (reviewing regulations promulgated by the EPA under the Clean Air Act imposing affirmative obligations upon several states to adopt a vehicle inspection and maintenance program and to require the retrofit of certain classes of vehicles with pollution control devices):

> [T]he [EPA] Administrator, in the exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator. For example, the attempt to require the state to "establish" [retrofit programs] is an impermissible encroachment on state sovereignty and goes beyond "regulation" by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation. If the federal government wants to impose a program under federal authority, it is limited by the restrictions applicable thereto.
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> . . .

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agents of the federal will, lacks all benefits of the American federalist system described by this Court in *Garcia*, *Ashcroft*, and elsewhere. In this respect, the 1985 Act is a dangerous precedent and should be declared unconstitutional.

While the take title provision contained in the 1985 Act may be avoided by compliance with other regulatory requirements, this fact renders it neither acceptable nor comparable to prior federal acts approved by this Court. Whether States adopt a program regulating the disposal of all in-state generated low-level radioactive waste in accordance with federal requirements or assume complete ownership responsibility for such wastes, including the liability that would otherwise rest with the non-state government generators under state law, the 1985 Act directly compels the States to take some type of extensive sovereign action to manage private and federal low-level

(Footnote continued.)

> In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles. . . . Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective. We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.

We bring this opinion to this Court's attention because we believe that it is an insightful examination by a lower court of federal action which closely approaches the affirmative duties imposed upon States by the LLRWPAA. Since *Train* was decided before both *Garcia* and *National League*, it reflects judicial considerations at a time when the scope of the Tenth Amendment was viewed quite narrowly, under this Court's holding in *Maryland v Wirtz*, 392 US 183 (1968) (Fair Labor Standards Act applicable to public hospitals, nursing homes, and educational institutions). *See also*, the several other EPA cases set forth in n 12, *supra*.

radioactive waste. This is an unprecedented and unconstitutional exercise of federal power.[16]

While Congress has in the past used the Commerce Clause as a basis for strongly encouraging state participation in federal regulatory schemes, such schemes have provided for voluntary state action in lieu of federal regulation (*e.g.*, Clean Air Act, 42 USC §§ 7401[a][3], 7407[a]; Clean Water Act, 33 USC § 1251[b]), or have made receipt of federal funds contingent upon voluntary compliance (*e.g.*, 23 USC § 154 [regulation of travel speed on public highways]). In cases where Congress directs that federal funding be contingent upon state participation in a federal regulatory scheme, States are left with the choice of whether the state interests advanced by such funding outweigh the burden upon the state governmental structure in fulfilling the federal regulatory functions imposed upon it. A similar choice is available to state sovereigns in cases where a federal regulatory scheme offers States the opportunity to participate in lieu of federal regulators. In all such cases, although the choice may be difficult, and the realistic probability that the State will elect not to participate in the federal regulatory scheme may be small, the choice exists nonetheless.

None of the arguments raised below in support of the 1985 Act is sufficient to justify its broad infringement upon state government powers. The claim that the LLRWPAA merely

[16]Ironically, if this federal mandate had been imposed on a private entity, it would constitute a taking which, under the Fifth Amendment, would entitle the entity to just compensation. *See, Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982). While the federal government might be free to "take" from the States authority to regulate in a given area by exercise of its power under the Supremacy Clause, its imposition on States of responsibility to enter or remain in an area against their will effectively commandeers the States' governmental processes in service of the federal government. Absent the protection of the Tenth Amendment, sovereign States would be left with fewer protections against federal intrusions than would private entities under the Fifth Amendment.

"was intended to salvage [the] approach" of the 1980 Act, which had been "unanimously endorsed by the States themselves" (US Br in Opp, p 16)[17] is both overstated and irrelevant. The 1985 Act differed substantially from its predecessor. Although New York does not concede that either Act was "endorsed" by the States, that question is of little interest here: New York's challenge to the later Act rests in the belief that even a federal act which has been supported by States' congressional delegations and promoted by various state interest groups such as the NGA may be defective insofar as it infringes upon the constitutional structure of the federal system. We submit that an essential premise of the federal system is the indispensability of State government policymaking. The federal legislative process, far removed from local problems and subject to the vagaries of sophisticated lobbying practices and other institutional pressures, simply cannot supply adequate long-term protection to that system of self-government. As Justice Powell noted in his dissent in *Garcia* (469 US at 576):

> One must compare realistically the operation of the state and local governments with that of the Federal Government. Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted.

The participation of a State's congressional delegation cannot sanction federal action which by its terms undermines the federal structure. That structure is mutable only by constitutional amendment pursuant to Article V, in cooperation with the States.

[17] References to "US Br in Opp" are to the United States respondents' Brief in Opposition to the Petitions for Writs of Certiorari.

Equally unavailing is the argument that the federal interest advanced under the Act justifies its terms (US Br in Opp, pp 17-18). The federal government has argued (US Br in Opp, p 18):

> [T]he subject matter involved—furnishing a safe method for long-term disposal of radioactive wastes—is one that, by its nature, is impressed with a public interest that makes participation by state governments especially appropriate, since the States will have to respond to any long-term problems the waste may produce.

This argument addressed several distinct issues. There is no question that waste disposal is a significant public problem. As such, it is a matter that many States might choose to address. Inasmuch as the disposal issue affects interstate commerce, certain federal action in the field is also appropriate, and state action may be subject to constraint by principles of preemption. In this respect, the "nature" of waste disposal is comparable to the problems of water or air pollution, addressed by federal statutes. Yet the importance of the issue to the States, or the preemptability of the field by Congress, does not justify the impressment of all States, even those that would not voluntarily participate, into the service of a federal program. *Cf. FERC v Mississippi*, 456 US at 785-786 (O'Connor, dissenting) (the fact that Congress "could have reached the same destination by a different route" is irrelevant to the Supreme Court's Tenth Amendment examination of a federal act). Participation in a federal scheme by willing States is entirely appropriate, as respondents suggest; but the LLRWPAA does not call for such willing participation.

The claim that New York's legislative decision to provide for the siting of a low-level waste facility within its borders sanctions the 1985 Act (US Br in Opp, p 19) is baseless. In

fact, that legislation was enacted only in response to the requirements of the LLRWPAA.[18]

Moreover, New York's past actions, either as a regulator of certain nuclear wastes or as a generator of wastes through New York State Power Authority nuclear power plants and state hospitals and research facilities, cannot justify the new encroachments on state sovereignty contained in the 1985 Act, in spite of the federal government's contrary suggestion (US Br in Opp, p 19). While New York has been involved in the field of radioactive materials regulation in the past as an "agreement State" under § 274 of the Atomic Energy Act (42 USC § 2021), the Agreement States Program applies a federal health and safety regulatory scheme that is altogether distinct from the LLRWPAA. It involves the willing participation of States, requires that voluntary state participants enact regulations consistent with federal standards, permits state participants to withdraw from the program, and provides a federal regulatory mechanism for those States which choose not to participate (42 USC § 2021[d]). At no time has the option of voluntary state participation in the Agreement States Program included the requirement that States enter into or remain in the business of disposing of low-level radioactive waste. Furthermore, as we have noted elsewhere, status as an agreement State offers New York only limited opportunity to regulate the generation of waste for which the 1985 Act makes it responsible, and to which the take title provision seeks to compel it to one day hold title. While New York could reduce its own share of the generation of low-level waste, it may limit generation of

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[18]*See*, Rappleyea Affidavit, JA 80a-81a. *See also*, Laws of New York 1986, chap. 673, § 2. Indeed, the New York Legislature has indicated its disagreement with the provisions of the Act through the passage of Laws of New York 1990, chap. 368, which, by providing that title to low-level waste shall at all times remain in the generator of such waste, directly contravenes certain sections of the take title provision. *See*, 1990 McKinney's Sessions Laws of New York, vol. II, p 2430 (State Executive Department Memorandum to chap. 368).

waste from other sources only insofar as the federal government permits under 42 USC § 2021. The majority of low-level waste stems from nuclear reactor facilities over which the NRC maintains exclusive health and safety regulatory authority. 10 CFR 50.2.

Contrary to the federal government's suggestion (US Br in Opp, pp 20-21), the provisions of the 1985 Act are not analogous to those involved in prior decisions of this Court upholding impositions of affirmative obligations upon State governments. Neither the duty of state trial courts of general jurisdiction to hear certain federal law claims *(Testa v Katt,* 330 US 386 [1947]), nor the susceptibility of state governments or agencies to federal judicial decree in particular cases *(Illinois v City of Milwaukee,* 406 US 91 [1972]; *Wyoming v Colorado,* 259 US 419 [1922]) imply a federal power to draft state governments into the service of federal regulatory schemes. *See, FERC,* 456 US at 784-785, 784 n 13 (O'Connor, J., dissenting in part).

Finally, the federal government provides no foundation for its claim that the responsibilities that devolve upon States under the 1985 Act are "less burdensome" than those imposed by the FLSA or the sections of TEFRA addressed by this Court in *Baker* (US Br in Opp, pp 21-22). To our knowledge, the relative economic impact of these various Acts is unknown. More importantly, this claim ignores the principal point of New York's argument: it is the nature and quality of the federal intrusion under the LLRWPAA which is constitutionally offensive, rather than the ultimate material cost of compliance with the Act. Unlike the FLSA, TEFRA, or any other federal action under the Commerce Clause previously scrutinized by this Court in light of the Tenth Amendment, the burden under the 1985 Act is uniquely imposed upon state governments and mandates the exercise of state sovereign power in accordance with a federal regulatory scheme. As this Court noted in *FERC* (456 US at 770, n 33):

> [I]n a Tenth Amendment challenge to congressional activity, "the determinative factor. . . [is] the nature of the federal action, not the ultimate economic impact on the States." *Hodel v Virginia Surface Mining & Recl., Ass., Inc.,* 452 U.S., at 292, n. 33.

For reasons described above, we submit that the nature of the federal action exemplified in the take title provision and section 3(a) of the Act exceeds the scope of congressional power delegated in the Constitution. Consequently, that action should be annulled and the 1985 Act stricken as unconstitutional.

B.

Moreover, the Act should be declared unconstitutional in its entirety. Courts have long recognized a presumption of severability of unconstitutional from constitutional sections of legislative acts, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not . . .". *Champlin Refining Co. v Corporation Commission of Oklahoma,* 286 US 210, 234 (1932). *See also, INS v Chadha,* 462 US 919, 931-32 (1983). In our view, it seems clear that Congress would not have enacted the remaining portions of the 1985 Act without the take title provision. Accordingly, a finding that this provision violates the Tenth Amendment renders the entire Act null and void.

As its legislative history makes clear, the 1985 Act was an intricate legislative compromise in which Congress sought to balance a multitude of disparate interests. During final debates on bill HR 1083, which upon enactment became the LLRWPAA, the measure was described by legislators as "a tenuous settlement" (Udall), "a delicately crafted compromise" (Bonker), "a reasonable compromise" (Markey), and

"a fundamental compromise" (Dingell). 131 Cong Rec H38115-38118 (Dec. 19, 1985). Similar remarks attesting to the lengthiness of negotiation over the measure, and the delicate nature of the balance of interests represented by the compromise bill, abounded in Senate floor debate on the measure. 131 Cong Rec S38403-38410 (December 19, 1985). Both Senator Thurmond and Senator Hollings of South Carolina recommended adoption of the bill, stressing the importance of the strict timetable for disposal site development as incentive to South Carolina, Washington and Nevada to continue to operate their sites. 131 Cong Rec S38407-38410 (December 19, 1985). As Senator Hollings observed (131 Cong Rec S38409):

> Last January, our Governor announced that he would shut our facility, if necessary, unless this issue were resolved in a form acceptable to South Carolina. I and every other member of the South Carolina congressional delegation supported him. But Governor Riley also went the extra mile, and said that he would hold good-faith discussions with those of the country that lack disposal capacity.
>
> The bill now before the Senate is the result of those discussions. It does not give the three sited States everything we would like. In fact, it is only barely acceptable. But it protects South Carolina's most important interests, and we will support it. The legislation gives the regions without sites continued access to our three waste facilities, in return for surcharges and, most importantly, a strict schedule by which other States must build their own facilities. The last point is crucial. We don't want this whole issue to resurface again in another few years.

The indispensable role of the take title provision in this compromise as a means of assuring States' compliance with the statutory timetable for development of regional or state disposal facilities was clearly attested by various members of the Senate. Senator Johnston, who together with several other senators proposed amendments to the bill which included the take title provision, expressed the importance of the concept in his description of the proposal (131 Cong Rec S38414 [Dec. 19, 1985]:)

> The substitute before us today is a compromise between the approach taken by the Committee on Energy and Natural Resources, which involves tough, enforceable milestones for State action over the next 7 years to deal with low-level radioactive waste disposal, and the approach of the Environment and Public Works Committee, which involves considerable more flexibility in the near term and a potentially very tough requirement at the end of the 7-year period that any State has failed to provide for the disposal of its low-level radioactive waste must take title to, and assume possession of, that waste.
>
> At my suggestion, all the Senators involved agreed that this sanction would be considerably strengthened if we also made such a State liable for the consequential damages resulting from the failure of the State to comply with these two requirements. . . .
>
> In my opinion, this language is essential to provide the teeth to the more flexible Environment and Public Works approach. We need this language to ensure that we are not faced in the 1990's with the same situation we face today—inaction by a few generating States and no available leverage to force action.

Senator McClure, also among the sponsors of the amended bill, stressed the importance of the stiffer milestones and penalties in the compromise proposal; he also took great care to assure that the take title provision applied to each of the regional compacts approved in Title II of the Act. 131 Cong Rec S38420 (Dec. 19, 1985). *But see*, Cong Rec H38117 (remarks of Representative Markey).

In light of these strong statements in support of the strict timetable and heavy burden of noncompliance with the Act, together with the difficult and tenuous nature of the compromise which the Act represented, it is evident that the Congress would not have passed the 1985 Act without the take title provision. Various legislators clearly expressed the dissatisfaction of South Carolina, Washington, and Nevada with milder forms of compulsion directed at waste generators, and their insistence that the States themselves be bound by statute to comply with the Act or suffer severe consequences. This legislative history strongly suggests that the principal incentives to compliance in addition to the take title provision—higher surcharges upon generators, and the power to exclude waste from non-complying States—would have been insufficient to meet these concerns.

Moreover, any presumption of severability of the take title provision is cast into doubt by the Congress's decision to approve individual regional compacts with express severability clauses under Title II of the Act. 131 Cong Rec S38410 (Dec. 19, 1985). The decision to approve severability clauses in seven separate sections of Title II while excluding such a clause in Title I strongly suggests that the provisions of Title I must stand or fall together.

CONCLUSION

The 1985 Act should be declared unconstitutional in its entirety.

Dated: Albany, New York
February 13, 1992

Respectfully submitted,

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Appendix. Low-Level Radioactive Waste Policy Amendments Act of 1985.

(Pub. L. 99-240, Title I, Jan. 15, 1986, 99 Stat. 1842)

§ 2021b. Definitions respecting low-level radioactive waste policy.

For purposes of sections 2021b to 2021j of this title:

(1) Agreement State

The term "agreement State" means a State that—

(A) has entered into an agreement with the Nuclear Regulatory Commission under section 2021 of this title; and

(B) has authority to regulate the disposal of low-level radioactive waste under such agreement.

(2) Allocation

The term "allocation" means the assignment of a specific amount of low-level radioactive waste disposal capacity to a commercial nuclear power reactor for which access is required to be provided by sited States subject to the conditions specified under sections 2021b to 202lj of this title.

(3) Commercial nuclear power reactor

The term "commercial nuclear power reactor" means any unit of a civilian light-water moderated utilization facility required to be licensed under section 2133 or 2134(b) of this title.

(4) Compact

The term "compact" means a compact entered into by two or more States pursuant to sections 2021b to 2021j of this title.

(5) Compact commission

The term "compact region" means the area consisting of all States that are members of a compact.

(6) Compact region

The term "compact commission" means the regional commission, committee, or board established in a compact to administer such compact.

(7) Disposal

The term "disposal" means the permanent isolation of low-level radioactive waste pursuant to the requirements established by the Nuclear Regulatory Commission under applicable laws, or by an agreement State if such isolation occurs in such agreement State.

(8) Generate

The term "generate", when used in relation to low-level radioactive waste, means to produce low-level radioactive waste.

(9) Low-level radioactive waste

The term "low-level radioactive waste" means radioactive material that—

(A) is not high-level radioactive waste, spent nuclear fuel, or byproduct material (as defined in section 2014(e)(2) of this title); and

(B) the Nuclear Regulatory Commission, consistent with existing law and in accordance with paragraph (A), classifies as low-level radioactive waste.

(10) Non-sited compact region

The term "non-sited compact region" means any compact region that is not a sited compact region.

(11) Regional disposal facility

The term "regional disposal facility" means a non-Federal low-level radioactive waste disposal facility in operation on January 1, 1985, or subsequently established and operated under a compact.

(12) Secretary

The term "Secretary" means the Secretary of Energy.

(13) Sited compact region

The term "sited compact region" means a compact region in which there is located one of the regional disposal facilities at Barnwell, in the State of South Carolina; Richland, in the State of Washington; or Beatty, in the State of Nevada.

(14) State

The term "State" means any State of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

§ 2021c. Responsibilities for disposal of low-level radioactive waste

(a)(1) Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—

(A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983;

(B) low-level radioactive waste described in subparagraph **(A)** that is generated by the Federal Government except such waste that is—

(i) owned or generated by the Department of Energy;

(ii) owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy; or

(iii) owned, or generated as a result of any research, development, testing, or production of any atomic weapon; and

(C) low-level radioactive waste described in subparagraphs (A) and (B) that is generated outside of the State and accepted for disposal in accordance with sections 2021e or 2021f of this title.

(2) No regional disposal facility may be required to accept for disposal any material—

(A) that is not low-level radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983, or

(B) identified under the Formerly Utilized Sites Remedial Action Program.

Nothing in this paragraph shall be deemed to prohibit a State, subject to the provisions of its compact, or a compact

region from accepting for disposal any material identified in subparagraph (A) or (B).

(b)(1) The Federal Government shall be responsible for the disposal of—

(A) low-level radioactive waste owned or generated by the Department of Energy;

(B) low-level radioactive waste owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy;

(C) low-level radioactive waste owned or generated by the Federal Government as a result of any research, development, testing, or production of any atomic weapon; and

(D) any other low-level radioactive waste with concentrations of radionuclides that exceed the limits established by the Commission for class C radioactive waste, as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983.

(2) All radioactive waste designated a Federal responsibility pursuant to subparagraph (b)(1)(D) that results from activities licensed by the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended, [42 U.S.C.A § 2011 et seq.], shall be disposed of in a facility licensed by the Nuclear Regulatory Commission that the Commission determines is adequate to protect the public health and safety.

(3) Not later than 12 months after January 15, 1986, the Secretary shall submit to the Congress a comprehensive report setting forth the recommendations of the Secretary for ensuring the safe disposal of all radioactive waste designated a Federal responsibility pursuant to subparagraph (b)(1)(D). Such report shall include—

(A) an identification of the radioactive waste involved, including the source of such waste, and the volume, concentration, and other relevant characteristics of such waste;

(B) an identification of the Federal and non-Federal options for disposal of such radioactive waste;

(C) a description of the actions proposed to ensure the safe disposal of such radioactive waste;

(D) a description of the projected costs of undertaking such actions;

(E) an identification of the options for ensuring that the beneficiaries of the activities resulting in the generation of such radioactive wastes bear all reasonable costs of disposing of such wastes; and

(F) an identification of any statutory authority required for disposal of such waste.

(4) The Secretary may not dispose of any radioactive waste designated a Federal responsibility pursuant to paragraph (b)(1)(D) that becomes a Federal responsibility for the first time pursuant to such paragraph until ninety days after the report prepared pursuant to paragraph (3) has been submitted to the Congress.

§ 2021d. Regional compacts for disposal of low-level radioactive waste

(a) In general

(1) Federal policy

It is the policy of the Federal Government that the responsibilities of the States under section 2021c of this title for the disposal of low-level radioactive waste can be most safely and effectively managed on a regional basis.

(2) Interstate compacts

To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(b) Applicability to Federal activities

(1) In general

(A) Activities of the Secretary

Except as provided in subparagraph (B), no compact or action taken under a compact shall be applicable to the trans-

portation, management, or disposal of any low-level radioactive waste designated in section 2021c(a)(1)(B)(i)-(iii) of this title.

(B) Federal low-level radioactive waste disposed of at non-Federal facilities

Low-level radioactive waste owned or generated by the Federal Government that is disposed of at a regional disposal facility or non-Federal disposal facility within a State that is not a member of a compact shall be subject to the same conditions, regulations, requirements, fees, taxes, and surcharges imposed by the compact commission, and by the State in which such facility is located, in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government.

(2) Federal low-level radioactive waste disposal facilities

Any low-level radioactive waste disposal facility established or operated exclusively for the disposal of low-level radioactive waste owned or generated by the Federal Government shall not be subject to any compact or any action taken under a compact.

(3) Effect of compacts on Federal law

Nothing contained in sections 2021b to 2021j of this title or any compact may be construed to confer any new authority on any compact commission or State—

(A) to regulate the packaging, generation, treatment, storage, disposal, or transportation of low-level radioactive waste in a manner incompatible with the regulations of the Nuclear Regulatory Commission or inconsistent with the regulations of the Department of Transportation;

(B) to regulate health, safety, or environmental hazards from source material, byproduct material, or special nuclear material;

(C) to inspect the facilities of licensees of the Nuclear Regulatory Commission;

(D) to inspect security areas or operations at the site of the generation of any low-level radioactive waste by the Federal

Government, or to inspect classified information related to such areas or operations; or

(E) to require indemnification pursuant to the provisions of chapter 171 of Title 28, (commonly referred to as the Federal Tort Claims Act) [28 U.S.C.A § 2671 et seq.], or section 170 of the Atomic Energy Act of 1954 (42 U.S.C. 2210) (commonly referred to as the Price-Anderson Act), whichever is applicable.

(4) Federal authority

Except as expressly provided in sections 2021b to 2021j of this title, nothing contained in sections 2021b to 2021j of this title or any compact may be construed to limit the applicability of any Federal law or to diminish or otherwise impair the jurisdiction of any Federal agency, or to alter, amend, or otherwise affect any Federal law governing the judicial review of any action taken pursuant to any compact.

(5) State authority preserved

Except as expressly provided in sections 2021b to 2021j of this title, nothing contained in sections 2021b to 2021j of this title expands, diminishes, or otherwise affects State law.

(c) Restricted use of regional disposal facilities

Any authority in a compact to restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the compact region shall not take effect before each of the following occurs:

(1) January 1, 1986; and

(2) the Congress by law consents to the compact.

(d) Congressional review

Each compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent.

§ 2021e. Limited availability of certain regional disposal facilities during transition and licensing periods

(a) Availability of disposal capacity

(1) Pressurized-water and boiling water reactors

During the seven-year period beginning January 1, 1986 and ending December 31, 1992, subject to the provisions of subsections (b) through (g) of this section, each State in which there is located a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section, shall make disposal capacity available for low-level radioactive waste generated by pressurized water and boiling water commercial nuclear power reactors in accordance with the allocations established in subsection (c) of this section.

(2) Other sources of low-level radioactive waste

During the seven-year period beginning January 1, 1986 and ending December 31, 1992, subject to the provisions of subsections (b) through (g) of this section, each State in which there is located a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section shall make disposal capacity available for low-level radioactive waste generated by any source not referred to in paragraph (1).

(3) Allocation of disposal capacity

(A) During the seven-year period beginning January 1, 1986 and ending December 31, 1992, low-level radioactive waste generated within a sited compact region shall be accorded priority under this section in the allocation of available disposal capacity at a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section and located in the sited compact region in which such waste is generated.

(B) Any State in which a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section is located may, subject to the provisions of its compact, prohibit the disposal at such facility of low-level radioactive waste generated outside of the compact region if the disposal

of such waste in any given calendar year, together with all other low-level radioactive waste disposed of at such facility within that same calendar year, would result in that facility disposing of a total annual volume of low-level radioactive waste in excess of 100 per centum of the average annual volume for such facility designated in subsection (b) of this section: *Provided, however,* That in the event that all three States in which regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b) of this section act to prohibit the disposal of low-level radioactive waste pursuant to this subparagraph, each such State shall, in accordance with any applicable procedures of its compact, permit, as necessary, the disposal of additional quantities of such waste in increments of 10 per centum of the average annual volume for each such facility designated in subsection (b) of this section.

(C) Nothing in this paragraph shall require any disposal facility or State referred to in paragraphs (1) through (3) of subsection (b) of this section to accept for disposal low-level radioactive waste in excess of the total amounts designated in subsection (b) of this section.

(4) Cessation of operation of low-level radioactive waste disposal facility

No provision of this section shall be construed to obligate any State referred to in paragraphs (1) through (3) of subsection (b) of this section to accept low-level radioactive waste from any source in the event that the regional disposal facility located in such State ceases operations.

(b) Limitations

The availability of disposal capacity for low-level radioactive waste from any source shall be subject to the following limitations:

(1) Barnwell, South Carolina

The State of South Carolina, in accordance with the provisions of its compact, may limit the volume of low-level radioactive waste accepted for disposal at the regional disposal facility located at Barnwell, South Carolina to a total of

8,400,000 cubic feet of low-level radioactive waste during the 7-year period beginning January 1, 1986, and ending December 31, 1992 (as based on an average annual volume of 1,200,000 cubic feet of low-level radioactive waste).

(2) Richland, Washington

The State of Washington, in accordance with the provisions of its compact, may limit the volume of low-level radioactive waste accepted for disposal at the regional disposal facility located at Richland, Washington to a total of 9,800,000 cubic feet of low-level radioactive waste during the 7-year period beginning January 1, 1986, and ending December 31, 1992 (as based on an average annual volume of 1,400,000 cubic feet of low-level radioactive waste).

(3) Beatty, Nevada

The State of Nevada, in accordance with the provisions of its compact, may limit the volume of low-level radioactive waste accepted for disposal at the regional disposal facility located at Beatty, Nevada to a total of 1,400,000 cubic feet of low-level radioactive waste during the 7-year period beginning January 1, 1986, and ending December 31, 1992 (as based on an average annual volume of 200,000 cubic feet of low-level radioactive waste).

(c) Commercial nuclear power reactor allocations

(1) Amount

Subject to the provisions of subsections (a) through (g) of this section each commercial nuclear power reactor shall upon request receive an allocation of low-level radioactive waste disposal capacity (in cubic feet) at the facilities referred to in subsection (b) of this section during the 4-year transition period beginning January 1, 1986, and ending December 31, 1989, and during the 3-year licensing period beginning January 1, 1990, and ending December 31, 1992, in an amount calculated by multiplying the appropriate number from the following table by the number of months remaining in the applicable period as determined under paragraph (2).

Reactor Type	4-year Transition Period		3-year Licensing Period	
	In Sited Region	All Other Locations	In Sited Region	All Other Locations
PWR	1027	871	934	685
BWR	2300	1951	2091	1533

(2) Method of calculation

For purposes of calculating the aggregate amount of disposal capacity available to a commercial nuclear power reactor under this subsection, the number of months shall be computed beginning with the first month of the applicable period, or the sixteenth month after receipt of a full power operating license, whichever occurs later.

(3) Unused allocations

Any unused allocation under paragraph (1) received by a reactor during the transition period or the licensing period may be used at any time after such reactor receives its full power license or after the beginning of the pertinent period, whichever is later, but not in any event after December 31, 1992, or after commencement of operation of a regional disposal facility in the compact region or State in which such reactor is located, whichever occurs first.

(4) Transferability

Any commercial nuclear power reactor in a State or compact region that is in compliance with the requirements of subsection (e) of this section may assign any disposal capacity allocated to it under this subsection to any other person in each State or compact region. Such assignment may be for valuable consideration and shall be in writing, copies of which shall be filed at the affected compact commissions and States, along with the assignor's unconditional written waiver of the disposal capacity being assigned.

(5) Unusual volumes

(A) The Secretary may, upon petition by the owner or operator of any commercial nuclear power reactor, allocate to such reactor disposal capacity in excess of the amount calcu-

lated under paragraph (1) if the Secretary finds and states in writing his reasons for so finding that making additional capacity available for such reactor through this paragraph is required to permit unusual or unexpected operating, maintenance, repair or safety activities.

(B) The Secretary may not make allocations pursuant to subparagraph (A) that would result in the acceptance for disposal of more than 800,000 cubic feet of low-level radioactive waste or would result in the total of the allocations made pursuant to this subsection exceeding 11,900,000 cubic feet over the entire seven-year interim access period.

(6) Limitation

During the seven-year interim access period referred to in subsection (a) of this section, the disposal facilities referred to in subsection (b) of this section shall not be required to accept more than 11,900,000 cubic feet of low-level radioactive waste generated by commercial nuclear power reactors.

(d)(1) Surcharges

The disposal of any low-level radioactive waste under this section (other than low-level radioactive waste generated in a sited compact region) may be charged a surcharge by the State in which the applicable regional disposal facility is located, in addition to the fees and surcharges generally applicable for disposal of low-level radioactive waste in the regional disposal facility involved. Except as provided in subsection (e)(2) of this section, such surcharges shall not exceed—

(A) in 1986 and 1987, $10 per cubic foot of low-level radioactive waste;

(B) in 1988 and 1989, $20 per cubic foot of low-level radioactive waste; and

(C) in 1990, 1991, and 1992, $40 per cubic foot of low-level radioactive waste.

(2) Milestone incentives

(A) Escrow account

Twenty-five per centum of all surcharge fees received by a State pursuant to paragraph (1) during the seven-year period

referred to in subsection (a) of this section shall be transferred on a monthly basis to an escrow account held by the Secretary. The Secretary shall deposit all funds received in a special escrow account. The funds so deposited shall not be the property of the United States. The Secretary shall act as trustee for such funds and shall invest them in interest-bearing United States Government Securities with the highest available yield. Such funds shall be held by the Secretary until—

(i) paid or repaid in accordance with subparagraph (B) or (C); or

(ii) paid to the State collecting such fees in accordance with subparagraph (F).

(B) Payments

(i) July 1, 1986

The twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning on January 15, 1986, and ending June 30, 1986, and transferred to the Secretary under subparagraph (A), shall be paid by the Secretary in accordance with subparagraph (D) if the milestone described in subsection (e)(1)(A) of this section is met by the State in which such waste originated.

(ii) January 1, 1988

The twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning July 1, 1986 and ending December 31, 1987, and transferred to the Secretary under subparagraph (A), shall be paid by the Secretary in accordance with subparagraph (D) if the milestone described in subsection (e)(1)(B) of this section is met by the State in which such waste originated (or its compact region, where applicable).

(iii) January 1, 1990

The twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning

January 1, 1988 and ending December 31, 1989, and transferred to the Secretary under subparagraph (A), shall be paid by the Secretary in accordance with subparagraph (D) if the milestone described in subsection (e)(1)(C) of this section is met by the State in which such waste originated (or its compact region, where applicable).

(iv) The twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning January 1, 1990 and ending December 31, 1992, and transferred to the Secretary under subparagraph 1 (A), shall be paid by the Secretary in accordance with subparagraph (D) if, by January 1, 1993, the State in which such waste originated (or its compact region, where applicable) is able to provide for the disposal of all low-level radioactive waste generated within such State or compact region.

(C) Failure to meet January 1, 1993 deadline

If, by January 1, 1993, a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region—

(i) each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1993 as the generator or owner notifies the State that the waste is available for shipment; or

(ii) if such State elects not to take title to, take possession of, and assume liability for such waste, pursuant to clause (i), twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning January 1, 1990 and ending December 31, 1992 shall be repaid, with interest, to each generator from whom such surcharge was collected. Repayments made pursuant to this clause shall be made on a monthly basis, with the first such repayment beginning on February 1, 1993, in an amount equal to one thirty-sixth of the total amount required to be repaid pursuant to this clause, and shall continue until the State (or, where applicable, compact region) in which such low-level radioactive waste is generated is able to provide for the disposal of all such waste generated within such State or compact region or until January 1, 1996, whichever is earlier.

If a State in which low-level radioactive waste is generated elects to take title to, take possession of, and assume liability for such waste pursuant to clause (i), such State shall be paid such amounts, as are designated in subparagraph (B)(iv). If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated provides for the disposal of such waste at any time after January 1, 1993 and prior to January 1, 1996, such State (or, where applicable, compact region) shall be paid in accordance with subparagraph (D) a lump sum amount equal to twenty-five per centum of any amount collected by a State under paragraph (1): *Provided, however,* That such payment shall be adjusted to reflect the remaining number of months between January 1, 1993 and January 1, 1996 for which such State (or, where applicable, compact region) provides for the disposal of such waste. If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take posession of the

waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

(D) Recipients of payments

The payments described in subparagraphs (B) and (C) shall be paid within thirty days after the applicable date—

(i) if the State in which such waste originated is not a member of a compact region, to such State;

(ii) if the State in which such waste originated is a member of the compact region, to the compact commission serving such State.

(E) Uses of payments

(i) Limitations

Any amount paid under subparagraphs (B) or (C) may only be used to—

(I) establish low-level radioactive waste disposal facilities;

(II) mitigate the impact of low-level radioactive waste disposal facilities on the host State;

(III) regulate low-level radioactive waste disposal facilities; or

(IV) ensure the decommissioning, closure, and care during the period of institutional control of low-level radioactive waste disposal facilities.

(ii) Reports

(I) Recipient

Any State or compact commission receiving a payment under subparagraphs (B) or (C) shall, on December 31 of each year in which any such funds are expended, submit a report to the Department of Energy itemizing any such expenditures.

(II) Department of Energy

Not later than six months after receiving the reports under subclause (I), the Secretary shall submit to the Congress a summary of all such reports that shall include an assessment of the compliance of each such State or compact commission with the requirements of clause (i).

(F) Payment to States

Any amount collected by a State under paragraph (1) that is placed in escrow under subparagraph (A) and not paid to a State or compact commission under subparagraphs (B) and (C) or not repaid to a generator under subparagraph (C) shall be paid from such escrow account to such State collecting such payment under paragraph (1). Such payment shall be made not later than 30 days after a detemination of ineligibility for a refund is made.

(G) Penalty surcharges

No rebate shall be made under this subsection of any surcharge or penalty surcharge paid during a period of noncompliance with subsection (e)(1) of this section.

(e) Requirements for access to regional disposal facilities

(1) Requirements for non-sited compact regions and non-member States

Each non-sited compact region, or State that is not a member of a compact region that does not have an operating disposal facility, shall comply with the following requirements:

(A) By July 1, 1986, each such non-member State shall ratify compact legislation or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within such State.

(B) By January 1, 1988.—

(i) each non-sited compact region shall identify the State in which its low-level radioactive waste disposal facility is to be located, or shall have selected the developer for such facility and the site to be developed, and each compact region or the State in which its low-level radioactive waste disposal facility is to be located shall develop a siting plan for such facility providing detailed procedures and a schedule for establishing a facility location and preparing a facility license application and shall delegate authority to implement such plan;

(ii) each non-member State shall develop a siting plan providing detailed procedures and a schedule for establishing a facility location and preparing a facility license application for a low-level radioactive waste disposal facility and shall delegate authority to implement such plan; and

(iii) The siting plan required pursuant to this paragraph shall include a description of the optimum way to attain operation of the low-level radioactive waste disposal facility involved, within the time period specified in sections 2021b to 2021j of this title. Such plan shall include a description of the objectives and a sequence of deadlines for all entities required to take action to implement such plan, including, to the extent practicable, an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning facility operation. Such plan shall also identify, to the extent practicable, the process for (1) screening for broad siting areas; (2) identifying and evaluating specific candidate sites; and (3) characterizing the preferred site(s), completing all necessary environmental assessments, and preparing a license application for submission to the Nuclear Regulatory Commission or an Agreement State.

(C) By January 1, 1990.—

(i) a complete application (as determined by the Nuclear Regulatory Commission or the appropriate agency of an agreement State) shall be filed for a license to operate a low-level radioactive waste disposal facility within each non-sited compact region or within each non-member State; or

(ii) the Governor (or, for any State without a Governor, the chief executive officer) of any State that is not a member of a compact region in compliance with clause (i), or has not complied with such clause by its own actions, shall provide a written certification to the Nuclear Regulatory Commission, that such State will be capable of providing for, and will provide for, the storage, disposal, or management of any low-level radioactive waste generated within such State and requiring disposal after December 31, 1992, and include a description of the actions that will be taken to ensure that such capacity exists.

(D) By January 1, 1992, a complete application (as determined by the Nuclear Regulatory Commission or the appropriate agency of an agreement State) shall be filed for a license to operate a low-level radioactive waste disposal facility within each non-sited compact region or within each non-member State.

(E) The Nuclear Regulatory Commission shall transmit any certification received under subparagraph (C) to the Congress and publish any such certification in the Federal Register.

(F) Any State may, subject to all applicable provisions, if any, of any applicable compact, enter into an agreement with the compact commission of a region in which a regional disposal facility is located to provide for the disposal of all low-level radioactive waste generated within such State, and, by virtue of such agreement, may, with the approval of the State in which the regional disposal facility is located, be

deemed to be in compliance with subparagraphs (A), (B), (C), and (D).

(2) Penalties for failure to comply

(A) By July 1, 1986

If any State fails to comply with subparagraph (1)(A)—

(i) any generator of low-level radioactive waste within such region or non-member State shall, for the period beginning July 1, 1986, and ending December 31, 1986, be charged 2 times the surcharge otherwise applicable under subsection (d) of this section; and

(ii) on or after January 1, 1987, any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b) of this section.

(B) By January 1, 1988

If any non-sited compact region or non-member State fails to comply with paragraph (1)(B)—

(i) any generator of low-level radioactive waste within such region or non-member State shall—

(I) for the period beginning January 1, 1988, and ending June 30, 1988, be charged 2 times the surcharge otherwise applicable under subsection (d) of this section; and

(II) for the period beginning July 1, 1988, and ending December 31, 1988, be charged 4 times the surcharge otherwise applicable under subsection (d) of this section; and

(ii) on or after January 1, 1989, any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b) of this section.

(C) By January 1, 1990

If any non-sited compact region or non-member State fails to comply with paragraph (1)(C), any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b) of this section.

(D) By January 1, 1992

If any non-sited compact region or non-member State fails to comply with paragraph (1)(D), any generator of low-level radioactive waste within such region or non-member State shall, for the period beginning January 1, 1992 and ending upon the filing of the application described in paragraph (1)(D), be charged 3 times the surcharge otherwise applicable under subsection (d) of this section.

(3) Denial of access

No denial or suspension of access to a regional disposal facility under paragraph (2) may be based on the source, class, or type of low-level radioactive waste.

(4) Restoration of suspended access; penalties for failure to comply

Any access to a regional disposal facility that is suspended under paragraph (2) shall be restored after the non-sited compact region or non-member State involved complies with such requirement. Any payment of surcharge penalties pursuant to paragraph (2) for failure to comply with the requirements of subsection (e) of this section shall be terminated after the non-sited compact region or non-member State involved complies with such requirements.

(f)(1) Administration

Each State and compact commission in which a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section is located shall have authority—

(A) to monitor compliance with the limitations, allocations, and requirements established in this section; and

(B) to deny access to any non-Federal low-level radioactive waste disposal facilities within its borders to any low-level radioactive waste that—

(i) is in excess of the limitations or allocations established in this section; or

(ii) is not required to be accepted due to the failure of a compact region or State to comply with the requirements of subsection (e)(1) of this section.

(2) Availability of information during interim access period

(A) The States of South Carolina, Washington, and Nevada may require information from disposal facility operators, generators, intermediate handlers, and the Department of Energy that is reasonably necessary to monitor the availability of disposal capacity, the use and assignment of allocations and the applicability of surcharges.

(B) The States of South Carolina, Washington, and Nevada may, after written notice followed by a period of at least 30 days, deny access to disposal capacity to any generator or intermediate handler who fails to provide information under subparagraph (A).

(C) Proprietary information.—

(i) Trade secrets, proprietary and other confidential information shall be made available to a State under this subsection upon request only if such State—

(I) consents in writing to restrict the dissemination of the information to those who are directly involved in monitoring under subparagraph (A) and who have a need to know;

(II) accepts liability for wrongful disclosure; and

(III) demonstrates that such information is essential to such monitoring.

(ii) The United States shall not be liable for the wrongful disclosure by any individual or State of any information provided to such individual or State under this subsection.

(iii) Whenever any individual or State has obtained possession of information under this subsection, the individual shall be subject to the same provisions of law with respect to the disclosure of such information as would apply to an officer or employee of the United States or of any department or agency thereof and the State shall be subject to the same provisions of law with respect to the disclosure of such information as would apply to the United States or any department or agency thereof. No State or State officer or employee who receives trade secrets, proprietary information, or other confidential information under sections 2021b to 2021j of this title may be required to disclose such information under State law.

(g) Nondiscrimination

Except as provided in subsections (b) through (e) of this section, low-level radioactive waste disposed of under this section shall be subject without discrimination to all applicable legal requirements of the compact region and State in which the disposal facility is located as if such low-level radioactive waste were generated within such compact region.

§ 2021f. Emergency access

(a) In general

The Nuclear Regulatory Commission may grant emergency access to any regional disposal facility or non-Federal disposal facility within a State that is not a member of a compact for

specific low-level radioactive waste, if necessary to eliminate an immediate and serious threat to the public health and safety or the common defense and security. The procedure for granting emergency access shall be as provided in this section.

(b) Request for emergency access

Any generator of low-level radioactive waste, or any Governor (or, for any State without a Governor, the chief executive officer of the State) on behalf of any generator or generators located in his or her State, may request that the Nuclear Regulatory Commission grant emergency access to a regional disposal facility or a non-Federal disposal facility within a State that is not a member of a compact for specific low-level radioactive waste. Any such request shall contain any information and certifications the Nuclear Regulatory Commission may require.

(c) Determination of Nuclear Regulatory Commission

(1) Required determination

Not later than 45 days after receiving a request under subsection (b) of this section, the Nuclear Regulatory Commission shall determine whether—

(A) emergency access is necessary because of an immediate and serious threat to the public health and safety or the common defense and security; and

(B) the threat cannot be mitigated by any alternative consistent with the public health and safety, including storage of low-level radioactive waste at the site of generation or in a storage facility obtaining access to a disposal facility by voluntary agreement, purchasing disposal capacity available for assignment pursuant to section 2021e(c) of this title or ceasing activities that generate low-level radioactive waste.

(2) Required notification

If the Nuclear Regulatory Commission makes the determinations required in paragraph (1) in the affirmative, it shall designate an appropriate non-Federal disposal facility or facilities, and notify the Governor (or chief executive officer) of the State in which such facility is located and the appropriate

compact commission that emergency access is required. Such notification shall specifically describe the low-level radioactive waste as to source, physical and radiological characteristics, and the minimum volume and duration, not exceeding 180 days, necessary to alleviate the immediate threat to public health and safety or the common defense and security. The Nuclear Regulatory Commission shall also notify the Governor (or chief executive officer) of the State in which the low-level radioactive waste requiring emergency access was generated that emergency access has been granted and that, pursuant to subsection (e) of this section, no extension of emergency access may be granted absent diligent State action during the period of the initial grant.

(d) Temporary emergency access

Upon determining that emergency access is necessary because of an immediate and serious threat to the public health and safety or the common defense and security, the Nuclear Regulatory Commission may at its discretion grant temporary emergency access, pending its determination whether the threat could be mitigated by any alternative consistent with the public health and safety. In granting access under this subsection, the Nuclear Regulatory Commission shall provide the same notification and information required under subsection (c) of this section. Absent a determination that no alternative consistent with the public health and safety would mitigate the threat, access granted under this subsection shall expire 45 days after the granting of temporary emergency access under this subsection.

(e) Extension of emergency access

The Nuclear Regulatory Commission may grant one extension of emergency access beyond the period provided in subsection (c) of this section, if it determines that emergency access continues to be necessary because of an immediate and serious threat to the public health and safety or the common defense and security that cannot be mitigated by any alternative consistent with the public health and safety, and that the

generator of low-level radioactive waste granted emergency access and the State in which such low-level radioactive waste was generated have diligently though unsuccessfully acted during the period of the initial grant to eliminate the need for emergency access. Any extension granted under this subsection shall be for the minimum volume and duration of the Nuclear Regulatory Commission finds necessary to eliminate the immediate threat to public health and safety or the common defense and security, and shall not in any event exceed 180 days.

(f) Reciprocal access

Any compact region or State not a member of a compact that provides emergency access to non-Federal disposal facilities within its borders shall be entitled to reciprocal access to any subsequently operating non-Federal disposal facility that serves the State or compact region in which low-level radioactive waste granted emergency access was generated. The compact commission or State having authority to approve importation of low-level radioactive waste to the disposal facility to which emergency access was granted shall designate for reciprocal access an equal volume of low-level radioactive waste having similar characteristics to that provided emergency access.

(g) Approval by compact commission

Any grant of access under this section shall be submitted to the compact commission for the region in which the designated disposal facility is located for such approval as may be required under the terms of its compact. Any such compact commission shall act to approve emergency access not later than 15 days after receiving notification from the Nuclear Regulatory Commission, or reciprocal access not later than 15 days after receiving notification from the appropriate authority under subsection (f) of this section.

(h) Limitations

No State shall be required to provide emergency or reciprocal access to any regional disposal facility within its borders

for low-level radioactive waste not meeting criteria established by the license or license agreement of such facility, or in excess of the approved capacity of such facility, or to delay the closing of any such facility pursuant to plans established before receiving a request for emergency or reciprocal access. No State shall, during any 12-month period, be required to provide emergency or reciprocal access to any regional disposal facility within its borders for more than 20 percent of the total volume of low-level radioactive waste accepted for disposal at such facility during the previous calendar year.

(i) Volume reduction and surcharges

Any low-level radioactive waste delivered for disposal under this section shall be reduced in volume to the maximum extent practicable and shall be subject to surcharges established in sections 2021b to 2021j of this title.

(j) Deduction from allocation

Any volume of low-level radioactive waste granted emergency or reciprocal access under this section, if generated by any commercial nuclear power reactor, shall be deducted from the low-level radioactive waste volume allocable under section 2021e(c) of this title.

(k) Agreement States

Any agreement under section 2021 of this title shall not be applicable to the determinations of the Nuclear Regulatory Commission under this section.

§ 2021g. Responsibilities of Department of Energy

(a) Financial and technical assistance

The Secretary shall, to the extent provided in appropriations Act, provide to those compact regions, host States, and nonmember States determined by the Secretary to require assistance for purposes of carrying out sections 2021b to 2021j of this title.—

(1) continuing technical assistance to assist them in fulfilling their responsibilities under sections 2021b to 2021j of this title. Such technical assistance shall include, but not be limited

to, technical guidelines for site selection, alternative technologies for low-level radioactive waste disposal, volume reduction options, management techniques to reduce low-level waste generation, transportation practices for shipment of low-level wastes, health and safety considerations in the storage, shipment and disposal of low-level radioactive wastes, and establishment of a computerized database to monitor the management of Low-level radioactive wastes; and

(2) through the end of fiscal year 1993, financial assistance to assist them in fulfilling their responsibilities under sections 2021b to 202lj of this title.

(b) Reports

The Secretary shall prepare and submit to the Congress on an annual basis a report which (1) summarizes the progress of low-level waste disposal siting and licensing activities within each compact region, (2) reviews the available volume reduction technologies, their applications, effectiveness, and costs on a per unit volume basis, (3) reviews interim storage facility requirements, costs, and usage, (4) summarizes transportation requirements for such wastes on an inter- and intra-regional basis, (5) summarizes the data on the total amount of low-level waste shipped for disposal on a yearly basis, the proportion of such wastes subjected to volume reduction, the average volume reduction attained, and the proportion of wastes stored on an interim basis, and (6) projects the interim storage and final disposal volume requirements anticipated for the following year, on a regional basis.

§ 2021h. Alternative disposal methods

(a) Not later than 12 months after January 15, 1986, the Nuclear Regulatory Commission shall, in consultation with the States and other interested persons, identify methods for the disposal of Low-level radioactive waste other than shallow land burial, and establish and publish technical guidance regarding licensing of facilities that use such methods.

(b) Not later than 24 months after January 15, 1986, the Commission shall, in consultation with the States and other interested persons, identify and publish all relevant technical information regarding the methods identified pursuant to subsection (a) of this section that a State or compact must provide to the Commission in order to pursue such methods, together with the technical requirements that such facilities must meet, in the judgment of the Commission, if pursued as an alternative to shallow land burial. Such technical information and requirements shall include, but need not be limited to, site suitability, site design, facility operation, disposal site closure, and environmental monitoring, as necessary to meet the performance objectives established by the Commission for a licensed low-level radioactive waste disposal facility. The Commission shall specify and publish such requirements in a manner and form deemed appropriate by the Commission.

§ 2021i. Licensing review and approval

In order to ensure the timely development of new low-level radioactive waste disposal facilities, the Nuclear Regulatory Commission or, as appropriate, agreement States, shall consider an application for a disposal facility license in accordance with the laws applicable to such application, except that the Commission and the agreement state[1] shall—

(1) not later than 12 months after January 15, 1986, establish procedures and develop the technical capability for processing applications for such licenses;

(2) to the extent practicable, complete all activities associated with the review and processing of any application for such a license (except for public hearings) no later than 15 months after the date of receipt of such application; and

(3) to the extent practicable, consolidate all required technical and environmental reviews and public hearings.

§ 2021j. Radioactive waste below regulatory concern

(a) Not later than 6 months after January 15, 1986, the Commission shall establish standards and procedures, pursuant to existing authority, and develop the technical capability for considering and acting upon petitions to exempt specific radioactive waste streams from regulation by the Commission due to the presence of radionuclides in such waste streams in sufficiently low concentrations or quantities as to be below regulatory concern.

(b) The standards and procedures established by the Commission pursuant to subsection (a) of this section shall set forth all information required to be submitted to the Commission by licensees in support of such petitions, including, but not limited to—

(1) a detailed description of the waste materials, including their origin, chemical composition, physical state, volume, and mass; and

(2) the concentration or contamination levels, half-lives, and identities of the radionuclides present.

Such standards and procedures shall provide that, upon receipt of a petition to exempt a specific radioactive waste stream from regulation by the Commission, the Commission shall determine in an expeditious manner whether the concentration or quantity of radionuclides present in such waste stream requires regulation by the Commission in order to protect the public health and safety. Where Commission determines that regulation of a radioactive waste stream is not necessary to protect the public health and safety, the Commission shall take such steps as may be necessary, in an expeditious manner, to exempt the disposal of such radioactive waste from regulation by the Commission.

Supreme Court, U.S.
FILED
FEB 13 1992
OFFICE OF THE CLERK

Nos. 91-543; 91-558; and 91-563

In The

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER THE COUNTY OF ALLEGANY

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(18151)

QUESTIONS PRESENTED FOR REVIEW

1. Does the Commerce Clause, Article I, Section 8, Clause 3, empower the national government to compel the states to exercise their reserved sovereign powers to implement a federal policy?

2. Does the Guarantee Clause, Article IV, Section 4, restrict the national government from compelling the states to exercise their reserved sovereign powers to implement a federal policy?

PARTIES

The parties to the proceeding below were:

1. The State of New York, Plaintiff-Appellant;
2. The County of Allegany, New York, Plaintiff-Appellant;
3. The County of Cortland, New York, Plaintiff-Appellant;
4. The United States of America, Defendant-Appellee;
5. James D. Watkins, as Secretary of Energy, Defendant-Appellee;
6. Kenneth M. Carr, as Chairman of the United States Nuclear Regulatory Commission, Defendant-Appellee;[1]
7. The United States Nuclear Regulatory Commission, Defendant-Appellee;
8. Samuel K. Skinner, as Secretary of Transportation, Defendant-Appellee;[2]
9. Richard Thornburgh, as United States Attorney General, Defendant-Appellee;[3]
10. The State of Washington, Intervenor-Appellee;
11. The State of Nevada, Intervenor-Appellee; and
12. The State of South Carolina, Intervenor-Appellee.

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[1] In the proceedings below, Kenneth M. Carr was named as a defendant in his capacity as Chairman of the United States Nuclear Regulatory Commission. Ivan Selin, Mr. Carr's successor in office, has been substituted pursuant to Supreme Court Rule 35.3.

[2] In the proceedings below, Samuel K. Skinner was named as a defendant in his capacity as Secretary of Transportation. Admiral James B. Busey IV, Mr. Skinner's successor in office, has been substituted pursuant to Supreme Court Rule 35.3.

[3] In the proceedings below, Richard Thornburgh was named as a defendant in his capacity as United States Attorney General. William P. Barr, Mr. Thornburgh's successor in office, has been substituted pursuant to Supreme Court Rule 35.3.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, issued on August 8, 1991, is reproduced at page 1 of the appendix to the petition for a writ of certiorari submitted by the County of Allegany, New York (hereinafter "A."), and is reported at 942 F.2d 114 (2d Cir. 1991).

The opinion of the United States District Court for the Northern District of New York (reproduced at A.17) is reported at 757 F. Supp. 10 (N.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 8, 1991. A.1. Jurisdiction to review the judgment of the Court of Appeals is conferred to this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The following constitutional provisions, statutes, and regulations are involved in this case.

The Commerce Clause, United States Constitution, Article I Section 8, Clause 3, which provides:

> The Congress shall have the Power...
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> * * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Guarantee Clause of the United States Constitution, Article IV, Section 4, which provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall pro-

tect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The Tenth Amendment to the United States Constitution, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Low-Level Radioactive Waste Policy Amendments Act of 1985, which provides in relevant part:

> (a)(1) Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of —
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> (A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983;
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> (B) low-level radioactive waste described in subparagraph (A) that is generated by the Federal Government except as such waste that is —
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> (i) owned or generated by the Department of Energy;
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> (ii) owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy; or
>
> (iii) owned or generated as a result of any research, development, testing, or production of any atomic weapon; and
>
> (C) low-level radioactive waste described in subparagraphs (A) and (B) that it generated outside of the State and accepted for disposal in accordance with sections 2021e or 2021f of this title.

42 U.S.C. § 2021c(a)(1).

* * * *

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021e(d)(2)(C).

STATEMENT OF THE CASE

Introduction

This case presents two related issues of fundamental importance to the structure of the federal system of the United States.

The first issue is whether the national government is empowered by the Commerce Clause to compel the states to exercise their reserved sovereign powers to carry out a federal policy. The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b *et seq.* (the "Act"), mandates that each state is "responsible" for the disposal of low-level radioactive waste generated within the state. While the states have three options as to how to carry out this responsibility, each requires action by state officials and/or expenditure of state funds. The Court of Appeals held that the Act's mandate was within the power of Congress pursuant to the Commerce Clause and that the federal courts have essentially no role in preserving state sovereignty in the federal system.

The second issue is whether the Guarantee Clause, Article IV, Section 4, bars congressional mandates to the states to carry out a federal policy. The Act requires the officials of each state to comply with a mandate by the national government regardless of the wishes of the people of each state. Petitioner Allegany County argued below that this mandate violates the constitutional guarantee of a republican form of government. The Court of Appeals implicitly held, however, that the Guarantee Clause did not provide any protection of state sovereignty.

These two issues go to the essence of the relationship between the states, the people of the states, and the national government. The use by the national government of schemes comprised of mandates and sanctions threatens to relegate the states to the status of mere departments or agents of the national government.

How The Case Arose

The Act provides that each state is "responsible" for disposal of low-level radioactive waste generated in the state. 42 U.S.C. § 2021c(a)(1). A state's responsibility is not conditioned on any actions by the state, and there is nothing the state can do to avoid this responsibility.

The states can meet their responsibility in only three ways. A state can either (a) alone, or with other states in a compact, develop a low-level radioactive waste disposal facility (42 U.S.C. §§ 2021c and 2021d); or (b) take title and possession of the low-level radioactive waste generated in the state (42 U.S.C. § 2021e[d][2][C]); or (c) become liable to the generators of such waste for all damages caused by the failure of the state to take title and possession of the waste. (42 U.S.C. § 2021e[d][2][C]). Under any of these options, the state is required to exercise its sovereign powers to meet a federally mandated obligation. The

Respondents have previously argued that such a mandate is authorized by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

Under compulsion of the Act, the State of New York has enacted various laws and formed a commission to find a site for a low-level radioactive waste disposal facility. This legislation and activity has been the result of the coercive nature of the Act. J.A. 80a-82a[4] (Affidavit of Clarence D. Rappleyea, Jr., sworn to September 5, 1990, ¶¶6-13). In September, 1989, the New York State Low-Level Radioactive Waste Disposal Siting Commission (the "Commission") designated three potential sites, each approximately one mile square, for a low-level radioactive waste disposal facility in the Allegany County Towns of Caneadea, West Almond, and Allen. J.A. 28a (Affidavit of Dolores Cross, sworn to September 5, 1990 ["Cross Aff."], ¶4). These three sites were selected from a candidate area previously identified by the Commission. *Id.*

Thereafter, the Board of Legislators of the County of Allegany enacted various resolutions opposing the selection of the County as a potential location for a low-level radioactive waste disposal facility and indicated the County's "irrevocable" opposition to the disposal facility. J.A. 28a (Cross Aff. ¶5). Nevertheless, the County and various County officials, against their will and against the will of their constituents, have been required to become involved in carrying out the congressional mandate with respect to low-level radioactive waste.[5] J.A. 30a (Cross Aff. ¶10).

[4] "J.A." refers to the Joint Appendix submitted in connection with this proceeding.

Proceedings Below

This action was brought by the State of New York, the County of Allegany, and the County of Cortland to obtain a declaratory judgment that the Act is null and void as violative of the United States Constitution. The federal defendants moved to dismiss the action for failure to state a claim. Thereafter, the District Court permitted a number of private generators of low-level radioactive waste to appear as an *amicus curiae*, in this action.

Subsequently, the States of Washington, Nevada, and South Carolina intervened as parties in this action and appeared in support of the constitutionality of the Act. These three states are the only states that currently have operating commercial low-level radioactive waste disposal facilities. The intervenors thereafter also moved to dismiss the action.

The State of New York and the County of Allegany also made a cross-motion for summary judgment. The defendants and the intervenors also moved for summary judgment.

For example, the Sheriff for Allegany County has been required to serve civil process and to accompany members of the Commission staff on various attempted visits to potential sites. Allegany County facilities such as the county jail, county courthouse, and other buildings have been used for the purpose of holding citizens who have been charged with impeding the actions of the Commission. The Allegany County District Attorney and his staff have been required to become involved in criminal prosecutions of citizens who allegedly illegally impeded the siting process. At various times the State of New York has indicated that the County may have to invoke the "mutual aid" system of police protection. When such "mutual aid" is requested, the County becomes financially liable for the services provided. Innumerable hours have been spent by County officials in setting up procedures to attempt to avoid violence during the siting process. J.A. 29a, 30a (Cross Aff. ¶¶8, 9).

On December 7, 1990, the District Court heard oral argument on all motions and issued its decision. The District Court ruled that *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), was dispositive of the case and barred any judicial intervention to declare the Act unconstitutional. A.21; *State of New York v. United States*, 757 F. Supp. 10, 12 (N.D. N.Y. 1990). The District Court granted the defendants' and intervenors' motion to dismiss the action, and judgment was entered on December 26, 1990. A.26, 27. On January 30, 1991, the State of New York, the County of Allegany, and the County of Cortland filed timely notices of appeal. The appeals were consolidated for hearing and determination by the Court of Appeals.

The appeals were argued before the United States Court of Appeals for the Second Circuit on May 21, 1991. On August 8, 1991, the Court of Appeals affirmed the decision of the District Court. The Court of Appeals agreed with the District Court that *Garcia* was dispositive and barred any judicial intervention. A.15, 16; *State of New York v. United States*, 942 F.2d 114, 121 (2d Cir. 1991).

Allegany County filed a petition for a writ of certiorari on October 3, 1991 (No. 91-558). The State of New York filed a petition for a writ of certiorari on September 30, 1991 (No. 91-543), and Cortland County also filed a petition on October 3, 1991 (No. 91-563). This Court granted all three petitions on January 10, 1992.

Basis For Federal Jurisdiction Of The District Court

The District Court had jurisdiction of this action under 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 2201, and 28 U.S.C. § 1346.

SUMMARY OF ARGUMENT

The Act's mandate that each state is responsible for the disposal of low-level radioactive waste generated within its borders violates the plan of federalism established by the United States Constitution. The principal protection of the sovereignty of each state is the fact that the national government is one of enumerated and, hence, limited powers. If an act of Congress is not within its enumerated powers, the act is unconstitutional and no further inquiry is needed.

Congress has broad power to regulate activity that affects interstate commerce and to use its spending powers to influence state action. However, the Commerce Clause does not authorize the national government to issue directives to the states. In formulating the Constitution, the Framers specifically rejected a scheme whereby the national government would use the machinery of the state governments to carry out its policy decisions. The Guarantee Clause and the Tenth Amendment both establish the separate sovereign nature of the states.

The Court of Appeals failed to consider whether the Act was within the power of Congress. The lower court mistakenly read this Court's decision in *Garcia* to limit any judicial inquiry to determining whether there was a defect in the political process leading to the passage of the Act. In fact, *Garcia* expressly recognizes the federal courts' role in determining whether an act of Congress violates affirmative limits placed on congressional power by the constitutional structure.

Moreover, the Court of Appeals incorrectly held that the Guarantee Clause does not protect the states from direct mandates by the national government. By its terms the Guarantee Clause requires that the United States guarantee to each state a government answerable to the people of the state. The Act ignores this guarantee and, at least with respect to low-level radioactive waste, renders each state a mere department or agent of the national government. The Act treats the states as divisions of one simple republic, contrary to the plain language of the Constitution and the intent of the Framers.

ARGUMENT

I. THE NATIONAL GOVERNMENT IS NOT EMPOWERED TO COMPEL THE STATES TO EXERCISE THEIR RESERVED SOVEREIGN POWERS.

A. The Constitution established a system of dual sovereignty.

This Court has recently confirmed the separate and independent existence of the states within the federal system.

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over a hundred years ago, the Court described the constitutional scheme of dual sovereigns:
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> " '[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,'... '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the reservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an in-

> destructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).
>
> The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991).

This federal structure of dual sovereignty has numerous advantages for the people of the nation. This system assures (i) a decentralized government more sensitive to the diverse needs of the nation; (ii) increased opportunity for citizen involvement in the democratic processes; (iii) innovation and experimentation in government; and (iv) responsive state governments because of competition for a mobile citizenry. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). The federal structure also protects the people of the nation from the tyranny that a single central government could establish. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (in the compound republic of America "a double security arises to the rights of the people" by the division of power between the state governments and the national government and then between the branches of each government).

Schemes authorizing legislation similar to the Act were considered, but rejected, in the drafting of the Constitution. As Justice O'Connor showed by an analysis of notes of the Constitutional Convention in her dissenting opinion in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 791-796 (1982), the Framers rejected the notion that the national government could commandeer the machinery of the state governments to carry out

its policies. The Convention settled on a federal system under which the national government had power to enact legislation that could operate upon the people directly. *Id.* Federal policy would not depend upon the cooperation or the obedience of the state legislatures, as under the Articles of Confederation. *Id.* The Convention also rejected a proposal authorizing the national government to use "force" to compel a state to "fulfill its duty" and a proposal giving the national legislature veto power over state laws. *Id.*

> Under the Articles of Confederation, the National Legislature operated through the States. The Framers could have fortified the central government, while still maintaining the same system, if they had increased Congress' power to demand obedience from state legislatures. In time, this scheme might have relegated the States to mere departments of the National Government.... The Framers, however, eschewed this course, choosing instead to allow Congress to pass laws directly affecting individuals, and rejecting proposals that would have given Congress military or legislative power over state governments. In this way, the Framers established independent state and national sovereigns. The National Government received the power to enact its own laws and to enforce those laws over conflicting state legislation. The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt. This product of the Constitutional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign.

Federal Energy Regulatory Commission v. Mississipi, 456 U.S. 742, 795-96 (1982) (O'Connor, J., dissenting) (footnotes omitted).*

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* The majority rejected Justice O'Connor's position that the act in question was unconstitutional on the ground that the act did not mandate an "imposition of general affirmative obligations". *Id.* at 769 n.32. The majority did not, however, voice any disagreement with Justice O'Connor's historical analysis.

Two provisions of the Constitution confirm the existence of the states as separate sovereign governments. The Guarantee Clause, Article IV, Section 4, provides: "The United States shall guarantee to every State in this Union a Republican Form of Government...." The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The combined import of these two provisions is that the states are separate sovereign governments, with general powers, answerable not to the national government but to the people of the states.

B. The Constitution does not authorize congressional mandates to the states.

The Commerce Clause, Article I, Section 8, Clause 3, gives Congress power "[t]o regulate Commerce...among the several States." Neither the text of the Commerce Clause nor the history of its application, however, gives the national government power to mandate that the states carry out federal policies.

While recent decisions of this Court have rejected Tenth Amendment claims by states attacking congressional legislation, none has addressed the issue of a direct congressional mandate to the states to exercise their sovereign powers to carry out a federal policy. These decisions have involved either regulation of state activity which affects interstate commerce or federal tax collection (*e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 [1985]; *Maryland v. Wirtz*, 392 U.S. 183 [1968]; *South Carolina v. Baker*, 485 U.S. 505 [1988] [taxes]; *Fry v. United States*, 421 U.S. 542 [1975]); the setting of conditions for state involvement in a federally preemptable field (*e.g., Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 [1982]); or the conditional grant of funds to the states (*e.g., South Dakota v. Adams*, 506 F. Supp. 50 [D.S.D.], *aff'd*, 635 F.2d 698 [8th Cir. 1980], *cert. denied*, 451 U.S. 984 [1981]; *Nevada v. Skinner*, 884 F.2d 445 [9th Cir. 1989], *cert. denied*, 493 U.S. 1070 [1990]).

This Court has thus never decided the constitutionality of a direct congressional mandate to the states based upon the Commerce Clause, although this is not the first time this issue has arisen. In *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977), this Court granted a petition for a writ of certiorari to review three different Courts of Appeals decisions that held that the Commerce Clause does not authorize a federal mandate to the states requiring the states to either establish programs to carry out a federal policy or else suffer sanctions.

Those three cases, *Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), and *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), dealt with attempts by the national government to implement the Clean Air Act. Pursuant to the Clean Air Act, if an area of a state fails to achieve compliance with air quality standards, the national government may step in and implement its own plan. *Maryland v Environmental Protection Agency*, 530 F.2d 215, 219 (4th Cir. 1975). In each of the cases, the states failed in their attempts to achieve air quality standards, and the EPA attempted to implement its "plan" by directing the state governments to take certain actions.

The three Courts of Appeals found that these mandates raised constitutional concerns and, therefore, interpreted the Clean Air Act as not authorizing such mandates. *Maryland v. Environmental Protection Agency*, 530 F.2d 215, 225-28 (4th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975); *Brown v. Environmental Protection Agency*, 521 F.2d 827, 837-42 (9th Cir. 1975). While the national government could permissibly bring in its own personnel and establish a program, it could

not seize the machinery of a state to carry out a federal action. The United States Court of Appeals for the Fourth Circuit noted:

> And, while it may be true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation under the commerce clause, it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws. As the Court stated in *In re Duncan*, 139 U.S. 449, 11 S.Ct. 573, 35 L.Ed. 219 (1891):
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> "By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative powers reposed in representative bodies..." 139 U.S. 449, 461, 11 S.Ct. 573, 577, 35 L.Ed. 219.
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> Not far afield is the rejection by the Philadelphia Convention of Charles Pinkney's constitutional plan which would have enabled Congress to "revise," "negative," or "annul" the laws of a state. See *Elliot's Debates* (Michie Ed., Vol. I, Book I, pp. 149, 400-01).
>
> If the national legislature may not revise, negative or annul a law of a state legislature, how an Act of Congress may be construed to permit an agency of the United States to direct a state legislature to legislate is difficult to understand.

Maryland v. Environmental Protection Agency, 530 F.2d 215, 225 (4th Cir. 1975). *Accord District of Columbia v. Train*, 521 F.2d 971 (D C. Cir. 1975); *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975).

Contra, Pennsylvania v. Environmental Protection Agency, 500 F.2d 246 (3d Cir. 1974).

This Court granted certiorari in all three EPA cases but vacated and remanded them for consideration of mootness when the EPA rescinded the objectionable regulations. *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977) (per curiam).

The bright line between congressional acts which influence, encourage, or regulate state activity, on the one hand, and a direct mandate by Congress to the states to carry out a federal policy, on the other, has now been crossed. As in the EPA cases, the Act's mandate violates the sovereignty of the states within our federal system. Whatever other limits the structure of the Constitution may impose on the exercise of Commerce Clause power, the national government may not direct the states to exercise their sovereign powers to carry out a federal policy. The power to regulate an activity affecting commerce, if willingly engaged in by a state, does not include, or even imply, the power to order a state to engage in such activity. The Constitutional Convention specifically determined not to give Congress such power. *See Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 795-96 (1982) (O'Connor, J., dissenting). The Act exceeded the constitutional power of Congress and is therefore null and void.

C. This Court can enforce the "affirmative limits" imposed by the constitutional structure.

In reviewing the Act, the Court of Appeals implicitly held that an analysis based on the text or history of the Constitution was unnecessary. Instead, it held that under *Garcia* and its progeny, absent a defect in the political process or an unequal treatment of a state, the federal courts have no role in protecting any aspect of the sovereignty of the states in the federal system.

No decision of this Court has gone so far in limiting the role of the federal courts. It is the well-established role of the federal courts "to say what the law is." *Marbury v. Madison*, 5 U.S. (1

Cranch) 137,177 (1803). This Court has steadfastly maintained in its Tenth Amendment decisions that it has *ample* power to prevent "the utter destruction of the State as a sovereign political entity." *Marland v. Wirtz*, 392 U.S. 183, 196 (1968); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985); *South Carolina v. Baker*, 485 U.S. 505, 528 (1988) (Scalia, J., concurring).

This Court has never disavowed a role in protecting states from direct congressional mandates. Indeed, in rejecting a number of recent Tenth Amendment challenges to various congressional acts, this Court has been careful to note that the statutes under review did not "authorize the imposition of general affirmative obligations on the States." *See, e.g., Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 769 n.32 (1982); *South Carolina v. Baker*, 485 U.S. 505, 514 (1988) ("[t]hat a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect"); *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 288 (1981) (congressional act held constitutional when there was "no suggestion that the Act commandeers the legislative processes of the States by compelling them to enact and enforce a federal regulatory program").

The role of the federal courts in protecting state sovereignty from congressional usurptions of power has been recognized since the proposal of the Constitution. In *The Federalist*, James Madison commented that the judiciary would play a vital role in preventing Congress from exceeding its enumerated powers. "In the first instance, the success of the usurpation will depend on the executive and judiciary departments...." The Federalist No. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961).

Alexander Hamilton similarly identified the power of the federal courts to declare unconstitutional congressional acts that exceed the limitations of the Constitution as essential to the preservation of the constitutional structure of the nation. The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[l]imitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void").

The Court of Appeals below ignored the role of the federal courts in protecting state sovereignty and misread the "national political process" test of *Garcia*. This test by its terms was only intended to apply to statutes which regulate ongoing activity that affects interstate commerce. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 537 (1985) (since municipal railroad affected interstate commerce "[a]ny constitutional exemption from the requirements of the FLSA [Federal Labor Standards Act] therefore must rest on SAMTA's status as a governmental entity rather than on the 'local' nature of its operations"). *See also Maryland v. Wirtz*, 392 U.S. 183, 196-97 (1968) ("[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, then the State too may be forced to conform its activities to federal regulation").

Garcia also established that the question of whether such otherwise permissible congressional regulation of interstate commerce might somehow objectionably impinge on a state's sovereignty was a matter to be decided by the "national political process". *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554-56 (1985). Yet this Court in *Garcia* specifically excluded from its consideration any decision as to what other limits may exist.

These cases do not require us to identify or define what af-

> firmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. *See Coyle v. Oklahoma*, 221 U.S. 559, 55 L.Ed. 853, 31 S.Ct. 688 (1911).

Id. at 556.[5]

Garcia stands for the proposition that when an act of Congress is within its enumerated powers, the federal court should not limit Congress's exercise of such powers based upon concepts of "traditional governmental functions" of the state government. However, this Court in *Garcia* specifically recognized that the federal courts must still consider "what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985).

[5] The Court of Appeals and the District Court below read the "affirmative limits the constitutional structure might impose" exception of *Garcia* too narrowly. Both lower courts inferred from this Court's citation to *Coyle* that *Garcia* stood for the proposition that the courts could only review congressional acts that upset the "equality" of the states. The decision in *Coyle*, however, was based on congressional interference with state sovereignty and *not* unequal treatment of the states. The Court in *Coyle* held that Congress could not direct the location of the State of Oklahoma's capital as a condition of admission because it could not direct such an order to the other states:

> The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?

Coyle v. Oklahoma, 221 U.S. 559, 565 (1911).

Therefore, both *Coyle* and *Garcia* recognized limitations on congressional power based on the structure of the Constitution, not simply upon equality among the states.

If the states are to be subjected to mandates from the national government to use their officials and funds to implement federal policies, then they will be less than sovereign entities and, in a real sense, mere agents or departments of the national government. Such a result would undermine the vital roles of the states in the federal system so recently affirmed by this Court in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). It is respectfully submitted that this Court should now act to prevent such a subjugation of the states and to preserve to the people of the United States the benefit of the system of dual sovereignty established by the Constitution.

II. THE ACT VIOLATES THE GUARANTEE OF A "REPUBLICAN FORM OF GOVERNMENT".

A. The Guarantee Clause protects state sovereignty.

The United States is constitutionally required to guarantee to every state in the Union a "Republican Form of Government". U.S. Const. art. IV, § 4. The key feature of a republic is "not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people...." The Federalist No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961). Each state of the Union is therefore guaranteed a government whereby the officials of a state are answerable to the people of a state and not to the legislature of the national government.

In an insightful article on the role of the Guarantee Clause in protecting state sovereignty, Professor Deborah Jones Merritt of the University of Illinois College of Law has shown that mandates by the national government to state governments to exercise their sovereign powers would violate the Guarantee Clause.

> In a republican government, all power derives from the voters. The citizens of a republican state decide when to exer-

> cise their legislative or executive power and how to wield that authority. If the federal government forces the states to adopt a statute, it destroys this relationship between state voters and their representatives; state legislators become accountable to Congress, rather than to their constituents. Similarly, if the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.

Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 61-62 (1988) (footnotes omitted). *See also* Laurence H. Tribe, *American Constitutional Law* § 5-23 (2d ed. 1988); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 789-91 (1982) (O'Connor, J., dissenting).

The Act represents an unprecedented invasion of state sovereignty by the national government. The mandatory nature of the Act and its sanctions undermine the separate character of the sovereign states and undermines the right of the people of the states to determine the course of their own governments with respect to low-level radioactive waste. New York and its political subdivisions have been required by the national government against the will of their constituents to exercise their sovereign powers to carry out the policies of the Act. *See* J.A. 28a-30a (Cross Aff. ¶¶ 3-11). However, as shown by Justice O'Connor in her dissenting opinion in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), and the Fourth Circuit in *Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), the notion that the national government could use the state governments to carry out federal policy decisions was rejected by the Framers.

B. This Court can enforce the Guarantee Clause's protection of state sovereignty.

The Act's contravention of the Guarantee Clause raises a justiciable issue. This Court has recognized that some Guarantee Clause claims are justiciable.

> [T]he implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action. It has been held that the clause gives Congress no power to impose restrictions upon a State's admission which would undercut the constitutional mandate that the State's be on an equal footing. *Coyle v. Smith*, 221 U.S. 559, 55 L. ed. 853, 31 S. Ct. 688. And in *Texas v. White* (US) 7 Wall 700, 19 L. ed. 227, although Congress had determined that the State's government was not republican in form, the State's standing to bring an original action in this Court was sustained.

Baker v. Carr, 369 U.S. 186, 226 n.53 (1962).

A congressional mandate that the states exercise their sovereign powers does not raise a "political question"; it raises an issue striking at the heart of the plan of federalism set forth in the Constitution. The Guarantee Clause does not merely express an ideal; it is an affirmative limit on federal action. As Professor Merritt has noted, a challenge by a state to a mandate by the national government meets the test for justiciability set forth in *Baker v. Carr*. *See* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 75-78 (1988).

Thus, while the federal courts have been understandably reluctant to consider whether particular schemes of state government are sufficiently "republican" to satisfy the Guarantee Clause, the use of the Guarantee Clause to protect state autonomy is an entirely different matter. As noted by Professor Merritt, this Court considered such a claim in *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

> These decisions suggest that a significant factor in the Supreme Court's refusal to adjudicate claims based on the guarantee clause has been its reluctance to interfere with the independence of state governments. The proposed construction of the guarantee clause, however, would not require the courts to overturn established bodies of state law or eject existing state governments from power. On the contrary, the courts would use the guarantee clause to protect state governments from undue federal interference. As in *Coyle*, claims that Congress has enacted an invalid "limitation upon the power of [a] State" should be justiciable.

Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 74-75 (1988) (footnotes omitted).

Professor Laurence Tribe has indicated a similar approach:

> To be sure, the Supreme Court has denied that the guaranty clause of Article IV, § 4, confers judicially cognizable rights upon *individuals*. But it has not avoided all judicial involvement in this sphere; rather, the Court has invoked the equal protection clause of the fourteenth amendment to protect each individual's right to participate in state and local government on an equal footing. And it need not follow from the unavailability of the guaranty clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*. It is, after all, the states to which the clause extends its explicit guarantee. If courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guaranty clause might well provide the most felicitous textual home for that enterprise.

Laurence H. Tribe, *American Constitutional Law* § 5-23, at 398 (2d ed. 1988) (emphasis in original) (footnotes omitted). *See also South Carolina v. Baker*, 485 U.S. 505, 531 (1988) (O'Connor, J., dissenting) ("[i]t is also arguable that the States' autonomy is protected from substantial federal incursions by virtue of the Guarantee Clause, Article IV, § 4").

This Court has recently recognized the Guarantee Clause as a potential source of protection of state sovereignty against congressional power.

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at " 'the heart of representative government.' " *Ibid.* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. *See Sugarman, supra*, 413 U.S., at 648, 93 S. Ct., at 2850-2851 (citing the Guarantee Clause and the Tenth Amendment). *See also* Merritt, 88 Colum.L.Rev., at 50-55.
>
> * * * *
>
> As against Congress' powers "[t]o regulate Commerce...among the several States," U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2402-03 (1991) (footnote omitted).

Here, the Act is destructive of an essential attribute of a republic — the right of the republic and its citizens to decide when and how to exercise the republic's sovereign powers. The Act mandates that the states will be responsible for the disposal of low-level radioactive waste generated in the state — there is no choice. The states, therefore, are no longer treated as confederated republics but as departments or agents of the national government. As such, the state governments are no longer answerable to the people of the states for the exercise of the states' sovereign powers but to the national government. This result violates the constitutional guarantee of a republican form of government to each state.

CONCLUSION

As this Court has recently observed, our Constitution establishes a system of dual sovereigns. The Low-Level Radioactive Waste Policy Amendments Act of 1985, however, is destructive of an essential attribute of this system — the rights of the states and their citizens to decide when and how to exercise the states' sovereign powers. By decreeing that the states are responsible for the disposal of low-radioactive wastes generated within the state, the national government treats the states as its mere agents or departments.

The lower court erred in allowing the national government to ignore the sovereign nature of the states and in denying that the federal courts have a legitimate role in protecting state sovereignty.

Dual sovereignty and judicial review are basic components of a constitutional structure that has served this nation well for over two hundred years. Such a vital protection of the people's liberty and access to government should not be abandoned based on a claim that the Act constitutes an expedient assignment of responsibility for disposal of low-level radioactive waste. It is respectfully submitted that the decision of the Court of Appeals should be reversed and the Act should be declared unconstitutional.

February 12, 1992

Respectfully submitted,

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CORRECTED COPY

Nos. 91-543, 91-558 and 91-563

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In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF ALLEGANY, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF CORTLAND, NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Tenth Amendment and related constitutional principles of federalism bar Congress from requiring New York to provide for the disposal of low-level radioactive waste generated within its borders.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 942 F.2d 114. The opinion of the district court (Pet. App. 18a-26a) is reported at 757 F. Supp. 10.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1991. The petitions for a writ of certiorari were filed on September 30, 1991 (No. 91-543) and October 3, 1991 (Nos. 91-558 and 91-563), and were granted on January 10, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b-2021j, are set out in the Appendix to the brief for petitioner New York State. N.Y. Br. 1a-30a.

STATEMENT

1. This case arises out of the continuing problem of disposing of commercial low-level radioactive waste (LLRW). LLRW originates in hospitals, nuclear power plants, research institutions, and private industry and comes in various forms, including radioactively contaminated protective gear, filters, glassware, and power-plant hardware.[2] After three of the Nation's commercial dis-

[1] "Pet. App." refers to the appendix to the petition in No. 91-543.

[2] LLRW was defined in Section 2(2) of the Low-Level Radioactive Waste Policy Act of 1980 (1980 Act), Pub. L. No. 96-573, 94 Stat. 3347, as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954 [42 U.S.C. 2014(2)]." The 1980 Act did not govern the disposal of LLRW "generated as a result of defense activities of the Secretary [of Energy] or Federal research and development activities," which was to be disposed of at federally owned facilities. 1980 Act § 4(a)(1)(A), 94 Stat. 3348.

posal facilities closed between 1975 and 1979 (including a disposal facility at the Western New York Nuclear Service Center in West Valley, New York), the Nation was left with only three commercial facilities, one each in Nevada, South Carolina, and Washington.[3] In 1979, Nevada and Washington, in the aftermath of a series of packaging and transportation incidents, ordered temporary shutdowns at the facilities within their borders.[4] Faced with the prospect of becoming the sole disposal facility for the Nation's LLRW, South Carolina ordered a 50% reduction in LLRW accepted by the facility within its borders.[5] Finally, confronted with growing public opposition to continued acceptance of LLRW from other States, all three sited States announced plans to implement permanent shutdowns. J.A. 109a, 142a, 147a. As testimony before Congress made clear, such a shutdown would have had a dramatic impact on the public welfare, possibly causing interruption of vital medical services.[6]

[3] See H.R. Rep. No. 1382, 96th Cong., 2d Sess., Pt. 2, at 25 (1980); 126 Cong. Rec. 20,136 (1980) (remarks of Sen. Thurmond).

[4] H.R. Rep. No. 314, 99th Cong., 1st Sess., Pt. 2, at 17-18 (1985) [hereinafter H.R. Rep. No. 99-314]; J.A. 109a. In addition to the temporary ban on all disposal, Washington, through initiative legislation approved in a statewide referendum, passed an initiative to prohibit importing LLRW from other States, but the Ninth Circuit held the law invalid as an impermissible restriction on interstate commerce. *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 630-632 (1982), cert. denied, 461 U.S. 913 (1983); see also *Illinois* v. *General Elec. Co.*, 683 F.2d 206, 213-215 (7th Cir. 1982) (striking down Illinois law forbidding import of spent nuclear fuel for storage); cf. *Hunt* v. *Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991) (upholding state law intended to discourage imports of hazardous waste from other States), cert. granted, No. 91-471 (Jan. 27, 1992).

[5] See H.R. Rep. No. 99-314, note 4, *supra*, Pt. 2, at 17-18.

[6] See, *e.g.*, *Low-Level Nuclear Waste Burial Grounds: Hearing Before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology*, 96th Cong., 1st Sess. 30-38 (1979) (testimony of Lawrence Muroff, M.D., American College of

Although Congress initially considered constructing LLRW disposal facilities on federal land,[7] pressure from the States led it to abandon this approach in favor of a state-oriented solution. A task force headed by seven Governors, working under the auspices of the National Governors' Association (NGA), proposed a "state solution" to the LLRW disposal problem, which the NGA then presented to Congress with the unanimous support of its members.[8] The NGA recommended that Congress

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Nuclear Physicians) [hereinafter *Burial Grounds Hearing*]; *id.* at 57-60 (statement and testimony of NRC Chairman Joseph Hendrie); see also U.S. General Accounting Office, *The Problem of Disposing of Nuclear Low-Level Waste: Where Do We Go From Here?* 1, 12 (1980) (describing potential effect of shutdown on medical services and illegal dumping).

[7] See H.R. 3298, 96th Cong., 1st Sess. §§ 203(a)(2) and (3), 206(c) and (d)(2) (1979) (bill introduced by Rep. Jeffords proposing construction of federal facilities for all radioactive waste, with limited provisions for Governors to influence federal site selection), *reprinted in To Amend the Atomic Energy Act of 1954: Hearings Before the Subcomm. on Energy and the Envt. of the House Comm. on Interior and Insular Affairs*, 96th Cong., 2d Sess. 530, 539-540, 548-551 (1985) [hereinafter *AEA Hearing*]; H.R. 5819, 96th Cong., 1st Sess. § 4(a) (1979) (bill introduced by Rep. McCormack proposing to direct the DOE, within six months, "to establish, operate, and maintain at least nine but no more than fourteen low-level radioactive waste repositories located at appropriate sites in the continental United States"), *reprinted in AEA Hearing*, *supra*, at 583; *Burial Grounds Hearing*, note 6, *supra*, at 2 (remarks of Rep. McCormack); *id.* at 66 (statement of DOE Deputy Under Secretary Worth Bateman).

[8] See National Governors' Ass'n, *Low-Level Waste: A Program for Action* (Nov. 1980) (Final Report of the NGA Task Force) (excerpts *reprinted at* J.A. 105a-141a) [hereinafter *1980 NGA Report*]; Holmes Brown, NGA Center for Policy Research, *Low-Level Waste Handbook* iii (1986) ("The National Governors' Association unanimously adopted the [1980] report."). Two other organizations of state government officials, the National Conference of State Legislatures and the President's State Planning Council on Radioactive Waste Management, submitted similar recommendations. See H.R. Rep. No. 99-314, note 4, *supra*, Pt. 2, at 18; 126 Cong. Rec.

enact legislation assigning to each State primary responsibility for ensuring the availability of adequate disposal capacity for LLRW generated within its borders. It suggested that States be allowed to meet this responsibility either individually (by providing for development of disposal facilities within their own borders), or cooperatively, by joining regional compacts that would provide disposal capacity for LLRW generated within member States. *1980 NGA Report*, note 8, *supra*, at 5-10, *reprinted in* J.A. 113a-119a. To encourage States to respond to the problem, the NGA recommended that Congress permit compacts with disposal facilities to discriminate against LLRW generated outside the compact. See *1980 NGA Report*, note 8, *supra*, at 72-73. Finally, although the NGA believed that the prospect of exclusion from existing facilities would be sufficient to induce States to act, see *id.* at 8, *reprinted in* J.A. 117, the NGA stated that "stronger federal action may be necessary" if the "states have not responded effectively" within a two-year period. See *id.* at 8-9, *reprinted in* J.A. 117a-118a.

The Low-Level Radioactive Waste Policy Act of 1980 (1980 Act) incorporated the States' principal recommendations.[9] Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and found that LLRW could be managed "most safely and efficiently * * * on a regional basis." Pub. L. No. 96-573, § 4(a)(1), 94 Stat. 3348. The 1980 Act therefore invited States to enter into regional compacts that, if ratified by Congress, would have the au-

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20,135 (1980) (remarks of Sen. Thurmond). We have lodged a copy of the *1980 NGA Report* with the Court.

[9] See *The Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste: Hearing Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 3 (1983) ("The National Governors Association endorsed adoption of [the 1980 Act].") (statement of Idaho Gov. John Evans representing the NGA).

thority, beginning in 1986, to restrict the use of their disposal facilities "to the disposal of low-level radioactive waste generated within the region." § 4(a)(2)(B), 94 Stat. 3348. Through this approach, Congress sought to avert the collapse of the Nation's LLRW-disposal system by providing for a five-year transition from the existing system, with its unwise dependence on unwanted shipments into the three States with disposal facilities, to a system of regional markets predicated on voluntary access agreements among the States. In keeping with the NGA's recommendations, Congress for the time being rejected more onerous alternatives [10] and chose not to provide direct penalties for States that failed to participate in this transition.[11] Instead, Congress relied on the States' interests in securing an outlet for LLRW generated within their borders to provide the impetus for them to act.

2. a. By 1985, it was clear that the 1980 Act's objectives would not be met. Although seven proposed compacts had been submitted to Congress for ratification, only three (the compacts that had been formed around the original three sited States) had operational disposal facilities. Approval of the three sited compacts would have left LLRW generators in 31 States without an assured outlet for their wastes. J.A. 143a. Congress found itself unable to ratify the pending compacts with-

[10] For example, under one early proposal, title to LLRW would have passed to the State in which it had been generated upon transfer from the generator to a licensed transporter for shipment to a disposal facility. See H.R. 5809, 96th Cong., 1st Sess. § 2(a) (1979), *reprinted in AEA Hearing*, note 7, *supra*, at 578; *Burial Grounds Hearing*, note 6, *supra*, at 6 (statement of Rep. Derrick). Another early proposal called for the denial of all applications for licenses or permits to generate LLRW in a State that failed to "assure the safe storage and disposal of all [LLRW] generated in that State." H.R. 6212, 96th Cong., 1st Sess. § 1 (1979), *reprinted in AEA Hearing*, note 7, *supra*, at 592-593.

[11] See 126 Cong. Rec. 20,137 (1980) (statement of Sen. Thurmond).

out "triggering a national emergency with grave implications for the public's health and safety." [12] To the sited States, this decision not to ratify meant an indefinite continuation of the existing inequitable distribution of LLRW disposal burdens. Accordingly, the Governors of Nevada, South Carolina, and Washington threatened to shut off or severely limit access to the Nation's only three disposal facilities because, in the words of Washington Governor Booth Gardner, "the people of Washington, South Carolina and Nevada [were] simply unwilling to have their states continue to serve as the dumping grounds for all other states' nuclear garbage." [13]

In light of this imminent crisis, Congress once again heard testimony as to the serious implications of the

[12] H.R. Rep. No. 99-314, note 4, *supra*, Pt. 2, at 18; see *Low-Level Waste Legislation: Hearings on H.R. 862, H.R. 1046, H.R. 1083, and H.R. 1267 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 1-2 (1985) (statement of Comm. Chairman Udall) [hereinafter *Legislation Hearing*]; 131 Cong. Rec. 38,404 (1985) (remarks of Sen. Hart); *id.* at 38,407 (remarks of Sen. Thurmond); *id.* at 38,421 (remarks of Sen. Mitchell).

The likelihood that Congress would decline to ratify pending compacts under these circumstances was not lost on the unsited States. One state official acknowledged in a 1985 Senate hearing that the State had slowed the development of its facility when "it became known that the date was expected to be extended." *Low-Level Radioactive Waste: Hearings on H.R. 862, H.R. 1046, H.R. 1083, H.R. 1267, H.R. 2062, H.R. 2635, and H.R. 2702 Before the Subcomm. on Energy Conserv. and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 229-230 (1985) (statement of Thomas Blackburn, Texas Low-Level Radioactive Waste Disposal Authority) [hereinafter *Waste Hearing*].

[13] *Low-Level Radioactive Waste Disposal: Joint Hearing on S. 1571 and S. 1578 Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 250 (1985) [hereinafter *Disposal Hearing*]; see H.R. Rep. No. 99-314, note 4, *supra*, Pt. 2, at 18-19; S. Rep. No. 199, 99th Cong., 1st Sess. 3-4 (1985) [hereinafter S. Rep. No. 99-199]; *Waste Hearing*, note 12, *supra*, at 150, 161-162 (testimony of South Carolina Gov. Richard Riley).

sited States' plans for the public health and welfare.[14] Convinced that "even a temporary shutdown of the waste disposal operations would have extremely serious consequences, including the closing of numerous facilities that are vital to the maintaining of essential public service," [15] Congress revisited the 1980 Act to strengthen incentives for the creation of new disposal capacity.

b. Representatives of sited and unsited States reconvened, under the auspices of the NGA and other organizations, to develop a legislative proposal for defusing

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[14] *E.g.*, *Legislation Hearing*, note 12, *supra*, at 123 ("failure to develop additional sites and/or any disruption in the availability of existing disposal capacity will have a serious and negative impact on the delivery of health care services and the cost of these services in this country") (testimony of Robert E. Henkin, M.D., American College of Nuclear Physicians); *Disposal Hearing*, note 13, *supra*, at 356-357 (describing possible effects of disposal facility shutdown on performance of radiological procedures and production of radiopharmaceuticals) (testimony of Stanley Goldsmith, M.D., Society of Nuclear Medicine); see also U.S. General Accounting Office, *Regional Low-Level Radioactive Waste Disposal Sites—Progress Being Made But New Sites Will Probably Not Be Ready by 1986*, at 8 (1983) ("Without a place to dispose of their radioactive waste, nuclear powerplants, hospitals, research institutions, and all kinds of industrial users or manufacturers may have to cease, or curtail severely, activities which use radioactive materials and which generate low-level radioactive waste.").

[15] S. Rep. No. 99-199, note 13, *supra*, at 3-4; see also 131 Cong. Rec. 38,404 (1985) (hospitals and laboratories 'normally have little ability to store their waste, and are thus tremendously dependent upon continued access to the three existing sites") (statement of Sen. Hart); *id.* at 38,409 ("Legislation is clearly needed for the purpose of preventing a nationwide crisis in low-level radioactive waste disposal.") (remarks of Sen. Bradley); *id.* at 38,417 ("If the three States choose to refuse wastes, many institutions such as research facilities, hospitals and universities will be in a difficult situation.") (remarks of Sen. Symms); *id.* at 38,423 ("[W]ithout the extension of the deadline for low-level nuclear waste this country will have unregulated nuclear waste at several unsanctioned sites across this country. Congress must not allow this situation to continue.") (remarks of Sen. Dixon).

the renewed disposal crisis without sacrificing the States' authority over the siting and operation of LLRW disposal facilities. These consultations played a key role in the formulation of H.R. 1083, 99th Cong., 1st Sess. (1985), which provided the framework for the 1985 Act.[16] This bill, according to its lead sponsor Representative Udall, was "primarily a resolution of the conflicts between the States that do not have disposal capacity and the three States that have capacity." 131 Cong. Rec. 35,203 (1985). New York firmly supported this effort to reinvigorate the state-oriented solution that had been adopted in 1980. Testifying before Congress, a Deputy Commissioner of New York's Energy Office acknowledged that New York was "highly likely to be a host State" due to its size and LLRW output, but nevertheless supported congressional efforts to resolve the conflict, including the creation of "specific and easily identifiable milestones," and suggested that Congress consider imposing "[a]ppropriate penalties * * * for failure to meet these milestones." [17] Similarly, Senator Moynihan of New York

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[16] See H.R. Rep. No. 99-314, note 4, *supra*, Pt. 1, at 14 (proposal developed under auspices of the NGA "served as a foundation for H.R. 1083"); 131 Cong. Rec. 35,204 (1985) ("H.R. 1083 represents the diligent negotiating undertaken by that group. The fundamentals of their settlement are embodied in the bill we are bringing to the floor today.") (remarks of Rep. Udall); J.A. 144a, 148a-149a (Affidavits of Washington Gov. Booth Gardner and South Carolina Gov. Carroll Campbell); *Waste Hearing*, note 12, *supra*, at 161-162 (testimony of South Carolina Gov. Richard Riley).

[17] *Legislation Hearing*, note 12, *supra*, at 98, 198 (testimony of Charles Guinn, Deputy Commissioner for Policy and Planning, New York State Energy Office); see *Low-Level Radioactive Waste Regional Compacts: Hearings on H.R. 1012, 3002, and 3777 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 266 (1983) (expressing New York's support for allowing sited compacts to exclude out-of-compact LLRW provided that "interim access to existing facilities will be made available" to generators in noncomplying states) (testimony of Eugene Gleason, Director of Policy Planning, New York State Energy Office).

urged his colleagues to enact the legislation in its final form.[18]

c. The resulting legislation, the Low-Level Radioactive Waste Policy Amendments Act of 1985, Title I of Pub. L. No. 99-240, 99 Stat. 1842 [hereinafter 1985 Act], reflects this carefully negotiated compromise between sited and non-sited States.[19] The benefits to non-sited States

[18] Senator Moynihan stated:

> I am pleased to report that this complex bill meets [the] conflicting needs [of the sited and non-sited States] very well. New Yorkers will continue to light some of their lights with nuclear electricity—and their doctors will continue to use life-saving laboratory tests that depend on the use of radioactive materials. So will the citizens of South Carolina—and they will be able to watch New York, and the rest of the Nation, make their own arrangements to dispose of their own low-level radioactive wastes.

131 Cong. Rec. 38,423 (1985).

[19] Pursuant to Title II of the same statute, the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, 99 Stat. 1859 [hereinafter Omnibus Compact Act], Congress approved 7 regional compacts (including three compacts centered on the already sited States), encompassing 41 States. Because of subsequent compact legislation and reshufflings among the States, there now are 9 approved compacts, with a total of 42 member States. See Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act, Pub. L. No. 100-712, 102 Stat. 4773 (1988); Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub. L. No. 100-319, 102 Stat. 471 (1988). This figure excludes Michigan, whose continuing status as a member of the Midwest compact is somewhat uncertain, for the reasons explained in its brief in this case. See Amicus Curiae Michigan Br. 5-7. In any event, Michigan will not be a member after July 23, 1992.

The remaining nine States (including Puerto Rico and the District of Columbia, which are treated as States under the 1985 Act, 42 U.S.C. 2021b(14)) have remained unaffiliated. Five of these—Maine, Massachusetts, New York, Texas, and Vermont—have announced plans for the development of LLRW disposal facilities within their borders. See Office of Environmental Restoration and Waste Management, U.S. Dep't of Energy, *Report to Congress in Response to Public Law 99-240: 1990 Annual Report on Low-Level Radioactive Waste Management Progress* 27-39 (1991) (annual report required by 42 U.S.C. 2021g(b)) [hereinafter *1990 DOE Report*]. The other four unaffiliated States either do not export LLRW (Puerto Rico) or export limited volumes under contract with a sited regional compact (the District of Columbia, New Hampshire, and Rhode Island). *Id.* at 41-43, 45-46. We have lodged a copy of the *1990 DOE Report* with the Court.

such as New York were clear and immediate: those States retained access to existing disposal sites for an additional seven years, running through 1992. 42 U.S.C. 2021e. The benefits to sited States were also substantial, largely consisting of three types of incentives to encourage non-sited States to respond to the problem.[20]

First. The 1985 Act affords States that enter compacts the opportunity to restrict access to disposal facilities located within their compact region. During a seven-year interim period (running through 1992), States that host a disposal facility located in a compact region can levy stiff surcharges against LLRW generated outside their compacts,[21] and, under certain limited circumstances,

[20] The 1985 Act also improved the 1980 Act by clarifying the definition of LLRW. As discussed in note 2, *supra*, the 1980 Act defined LLRW negatively, as any radioactive waste outside of certain specific categories. One of these categories—transuranic waste—changed with every change in the regulatory definition of transuranic waste. See *Legislation Hearing*, note 12, *supra*, at 312. 42 U.S.C. 2021c(a)(1)(A) resolves this problem by providing specifically that States are responsible only for class A, B, or C radioactive waste, as defined by the 1983 version of NRC's regulations, 47 Fed. Reg. 57,473-57,474, codified at 10 C.F.R. 61.55 (1983). Moreover, Section 2021c(a)(1)(B) provides that the States are not responsible for LLRW falling within the definition in Section 2021c (a)(1)(A) if it is produced by the Department of Energy, the United States Navy as a result of decommissioning vessels, or any facility involved in atomic weapons research or production.

[21] See 42 U.S.C. 2021e(d)(1) (permitting surcharges on extra-regional LLRW at the rate of $10 per cubic foot during 1986 and 1987, increasing to $40 per cubic foot during 1990, 1991, and 1992); Section 2021e(e)(2)(A)(i), (B)(i) and (D) (permitting penalty surcharges, ranging from two to four times ordinary surcharge levels, for LLRW that originates in States that fail to comply with certain milestones set forth in Section 2021e(e)(1)).

can exclude such out-of-compact LLRW altogether.[22] Moreover, beginning in 1993, approved regional compacts will have complete freedom—limited only by the terms of their compacts—to impose price discrimination and access restrictions on LLRW generated outside of the compact region.[23]

Second. The 1985 Act also seeks to encourage development of new disposal capacity through federal payments to States and regional compacts that meet the statutory milestones for siting, licensing, and completing disposal facilities.[24] Payments are made from an escrow account, managed by the Secretary of Energy, 42 U.S.C. 2021e(d)(2)(A), that contains one-fourth of the disposal

[22] During the interim access period, Section 2021e(e)(2)(A)(ii), (B)(ii) and (C) permits the existing facilities to exclude LLRW that originates in States that fail to comply with certain milestones set forth in Section 2021e(e)(1). Furthermore, Section 2021e(b) permits the existing facilities to limit disposal to amounts of LLRW specified in the Act.

[23] See 42 U.S.C. 2021d(c) (congressional approval as prerequisite to imposition of access restrictions by compacts). For an existing compact permitting such restrictions, see, *e.g.*, Northwest Interstate Compact, Arts. IV(2), V, 99 Stat. 1862-1863.

[24] The 1985 Act calls for incentive payments (1) if a State meets the 1986 deadline to join a compact or indicate its intent to develop a site of its own, Section 2021e(d)(2)(B)(i) and (e)(1)(A); (2) if a State meets the 1988 deadline to develop a siting plan, Section 2021e(d)(2)(B)(ii) and (e)(1)(B); (3) if a State meets the 1990 deadline to file an application with the NRC or certifies that it will be able to provide for its LLRW after 1992, Section 2021e(d)(2)(B)(iii) and (e)(1)(C); or (4) if a State is able to provide for disposal of all of its LLRW by 1993, Section 2021e(d)(2)(B)(iv). Under Section 2021e(e)(1)(F), a State also can qualify for incentive payments by entering into an agreement with a compact commission for a sited compact that provides for disposal of all LLRW generated within that State.

The States and compacts may use these incentive payments to finance the creation, management, regulation, and closure of LLRW disposal facilities, or to mitigate the effects of hosting a disposal facility. Section 2021e(d)(2)(E)(i).

surcharges paid by generators during the seven-year interim access period. Incentive payments to an unsited State or compact are proportionate to the surcharges that generators have paid to dispose of LLRW generated within that State or compact. New York, like most of the unsited States and compacts, met the first three incentive payment milestones and collected its incentive payments for doing so.[25]

Third. The final set of incentives is in the form of penalties, not rewards. These penalties are the costs to generators that result from discrimination by regional compacts against LLRW generated outside their regions. Initially, these costs—in the form of the surcharges discussed *supra*, at note 21—fall solely on LLRW generators. The final penalty for the States' failure to act, however, falls more directly on the States themselves:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator

[25] All six unsited compacts (counting the dissolved Western Compact and the newly formed Southwestern Compact as one) and four of the nine unaffiliated States (including New York) met the first three statutory milestones. *1990 DOE Report*, note 19, *supra*, at 65-66. Moreover, New York informed the court of appeals that it was "currently in full compliance with the 1985 Act" and recounted without qualification its 1989 certification to Congress that the State would "be able to store, manage, or dispose of its LLRW after January 1, 1993." N.Y. C.A. Br. 10 & n.8. Similarly, in January 1991, New York formally assured the sited States that its wastes would not become an involuntary burden on them. See *1990 DOE Report*, note 19, *supra*, at 69.

or owner notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(C).[26] This so-called "take-title" provision originated with the Senate Committee on Environment and Public Works. See S. 1578, 99th Cong., 1st Sess. (1985); 131 Cong. Rec. 38,414 (1985) (remarks of Sen. Johnston).[27] It was viewed as imposing on unsited States a liability risk (albeit one that every State could prevent from materializing),[28] in return for important benefits, "chief of which is the right [as a member of an approved compact] to exclude low-level radioactive waste not generated in the compact region from any disposal facility located within the region." 131 Cong. Rec. 38,415 (1985) (remarks of Sen. Johnston).[29]

3. When Congress enacted the 1980 Act, New York's non-federal LLRW generators, including the state government as one of the State's major generators in its own right,[30] had been entirely dependent on the disposal facilities in Nevada, South Carolina, and Washington for five years.[31] In response to the Act, New York entered

[26] The 1985 Act also includes a January 1, 1993, milestone (three years before the January 1, 1996, deadline) for States to provide for the disposal of all LLRW generated within their borders. 42 U.S.C. 2021e(d)(2)(C). States that miss the 1993 milestone, however, need not take title to LLRW generated within their borders; Section 2021e(d)(2)(C)(ii) allows them to avoid the take-title sanction until 1996 simply by forfeiting to the generators the incentive payments specified in Section 2021e(d)(2)(B)(iv), see note 24, *supra*.

[27] The take-title provision was incorporated in a package of amendments to H.R. 1083, which was approved by the Senate, 131 Cong. Rec. at 38,425, adopted by the House with certain modifications, *id.* at 38,117-38,120, and reaffirmed by the Senate as modified, *id.* at 38,558. The notion of requiring States to take title initially was suggested in 1979, see note 10, *supra* (discussing proposal of Rep. Derrick), and raised again in the 1985 hearings, see *Waste Hearing*, note 12, *supra*, at 336, 351-352 (NRC testimony and prepared answers); *Disposal Hearing*, note 13, *supra*, at 574, 577 (NRC support for "language to vest title to the waste in such states no later than the close of 1992").

[28] The 1996 take-title deadline, just under 10 years from the effective date of the 1985 Act, offered States a time period one year longer than the NRC's most conservative estimate of the time required to site, construct, and license a disposal facility. *Waste Hearing*, note 12, *supra*, at 391-393 (testimony and statement of John Davis, Director, NRC's Office of Nuclear Materials Safety and Safeguards). There was no indication from unsited States or other interested parties that this deadline was too ambitious. See 131 Cong. Rec. 38,115 (1985) ("all States will have developed management ability by that time") (remarks of Rep. Udall); *id.* at 38,408 ("the milestones in the bill are considered to be achievable by all unsited States or compact regions") (remarks of Sen. Stafford).

[29] Amicus Curiae Council of State Governments suggests (Br. 27) that the take-title provision would support an injunction compelling a State to take physical possession. We disagree. The language of the take-title provision is plainly susceptible of a more natural reading, under which non-complying States and compacts may refuse possession, but become liable for damages if they do so. To our knowledge, the expansive interpretation posited by the Council has never been endorsed by any court or federal agency.

[30] In 1990, New York generators shipped approximately 71,000 cubic feet of LLRW to the Nation's three commercial LLRW disposal facilities, the fourth highest volume of any State and 6.2% of the national total. See New York State Energy Research and Development Auth., *New York State Low-Level Radioactive Waste Status Report for 1990* at 17 (1991) [hereinafter *1990 New York Report*]. State-owned generators accounted for a considerable proportion of this waste stream; its two nuclear power plants alone (the Fitzpatrick and Indian Point No. 3 plants) accounted for approximately 23% of the State's commercial LLRW by volume and 17% by total radioactivity. *Id.* at 20, 32-33. Like other commercial nuclear power plants, New York's installations have been assigned guaranteed, transferable allocations of disposal capacity at the three existing disposal facilities. See *1990 DOE Report*, note 19, *supra*, at A-9 (describing New York's guaranteed allocations under 42 U.S.C. 2021e(c)(1)-(4)). Small additional quantities of LLRW also were generated by state-operated medical and research institutions. See *1990 New York Report*, *supra*, at 5. A copy of the *1990 New York Report* has been lodged with the Court.

[31] An LLRW disposal facility, licensed and regulated by New York and operated by its lessee, the Nuclear Fuel Services Company, operated in West Valley, New York, from 1963 through 1975,

into compact negotiations with several other northeastern States, but soon withdrew in favor of a "go it alone" approach advocated by the State's Energy Office. See *Legislation Hearing*, note 12, *supra*, at 197 (testimony of Charles Guinn).

Thus, Governor Cuomo proposed state legislation designed to ensure "operation of a permanent [LLRW disposal] facility in New York State" by 1993. See *Legislation Hearing*, note 12, *supra*, at 197 (testimony of Charles Guinn). In 1986, the New York Legislature concluded that New York no longer could "assume that other states will continue indefinitely to provide access to facilities adequate for the permanent disposal of low-level radioactive waste generated in New York." 1986 N.Y. Laws, ch. 673, § 2. It therefore enacted legislation providing for the siting and financing of an LLRW facility in New York in order "to provide for continued operation of essential and beneficial medical, research, industrial, energy and other facilities in New York which use radioactive materials and generate [LLRW] and to

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when it was closed due to water management problems. See U.S. Dep't of Energy, *Western New York Nuclear Service Center Study: Companion Report*, 3-38 to 3-54 (1978). The Center also housed an NRC-licensed commercial nuclear fuel reprocessing center (the only one in the Nation), which was operated by the same lessee from 1966 through 1972, and an NRC-licensed disposal facility that accepted wastes produced by the fuel reprocessing operation from 1966 through 1982. See Oak Ridge Nat'l Laboratory, U.S. Dep't of Energy, *Integrated Data Base for 1991: U.S. Spent Fuel and Radioactive Waste Inventories, Projections, and Characteristics* 122 & note b (1991); U.S. Dep't of Energy, *Annual Report to Congress: West Valley Demonstration Project* 3, 12 (1991) (report required by Section 4 of the West Valley Demonstration Project Act, Pub. L. No. 96-368, 94 Stat. 1349 (1980)). The Center is presently the site of a federal-state demonstration project that is stabilizing and solidifying approximately 2 million liters of high-level liquid wastes left by New York's lessee. *Annual Report, supra*, at 3-7, 23 (describing the project's uses of $457 million in federal funding through fiscal year 1990).

protect the public health and safety." *Ibid.*[32] The statute reflects the State's choices to act independently rather than to join a regional compact, to develop a disposal facility rather than to contract with a sited compact, and to undertake this development directly, rather than through a contractor.[33] Funding for these efforts comes from two sources: assessments on nuclear power plants and federal payments received by New York for meeting the milestones set forth in the 1985 Act. See N.Y. Pub. Auth. Law § 1854-d(2) (McKinney Supp. 1992).[34]

In 1988, New York developed a list of five potential sites, two in Cortland County and three in Allegany

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[32] See also C.A. App. 117, 123, 136, 139, 142, 145, 148 (references to the threat of a loss of access for New York generators in recommendations favoring the State's 1986 legislation).

[33] See N.Y. Envtl. Conserv. Law §§ 29-0301 to 29-0305, 29-0501 to 29-0503 (McKinney Supp. 1992); N.Y. Pub. Auth. Law § 1854-c.3 (McKinney Supp. 1992). The current version of this legislation incorporates amendments contained in two 1990 statutes. The first amended provisions of the State's 1986 law that had called for title to LLRW to "vest in the State of New York upon acceptance of such waste by the authority at the permanent disposal facilities." 1986 N.Y. Laws, ch. 673, § 4 (formerly codified at N.Y. Pub. Auth. Law 1854-d(6)). The amended version provides that title will "at all times remain in the generator of such waste, including the period following acceptance" at the State's facilities. 1990 N.Y. Laws, ch. 368, § 1, codified at N.Y. Pub. Auth. Law § 1854-d(6) (McKinney Supp. 1992). The second set of amendments revised the State's siting process, altering the composition of the Siting Commission and Advisory Committee (renamed the "Citizens Advisory Committee"), and modifying these bodies' mandate to require selection of a disposal method before the siting process could recommence. See 1990 N.Y. Laws, ch. 913, codified at N.Y. Envtl. Conserv. Law §§ 29-0301 to 29-0505.

[34] All of these decisions are consistent with the State's long history of active involvement in the nuclear field, see C.A. App. 198 (1959 report advocating state involvement in nuclear power and assumption of regulatory authority under the agreement-states program, see note 51, *infra*), both as a promoter and regulator of nuclear industry, see Pet. App. 5a-6a, and a large-scale generator of LLRW, see note 30, *supra*.

County. Residents of the two counties have opposed consideration of these sites. J.A. 29a-30a, 42a, 66a-68a. These protests led to suspension of siting activities in April 1990, see *1990 DOE Report*, note 19, *supra*, at 33, and to enactment of state legislation amending the siting process later that year. See note 33, *supra*.[35]

4. Petitioners filed this suit in February 1990, seeking a declaratory judgment that the 1985 Act violates the Tenth and Eleventh Amendments, as well as the Guaranty Clause of Article IV.[36] The district court granted summary judgment in favor of the United States. Pet. App. 18a-26a. Rejecting the Tenth Amendment arguments, the district court found that the Act was not the product of any defect in the political process and that New York had not been singled out for especially harsh treatment. Pet. App. 21a-25a. In addition, the court summarily rejected petitioners' Eleventh Amendment argument, holding that the Eleventh Amendment operates as a restriction on judicial, not congressional, power. Pet. App. 25a (citing *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989)). Finally, the court dismissed petitioners' claims under the Guaranty Clause, finding them to be "inextricably intertwined" with their unmeritorious Tenth and Eleventh Amendment claims. *Ibid.*

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[35] Although the Town of Ashford recently expressed interest in hosting a disposal facility, the relevant resolution of its own board was struck down by a state trial court because it had not been preceded by an environmental study found to be necessary under state law. *Mayerat* v. *Town Board*, 575 N.Y.S. 2d 765, 769-773 (1991). The Town's resolution invited the New York Legislature to consider resuming LLRW disposal at the Western New York Nuclear Services Center, a state-owned installation located within the Town's boundaries. See note 31, *supra*. Current New York law specifically bars the State's LLRW Siting Commission from choosing the Center as an appropriate site for a disposal facility. N.Y. Envtl. Conserv. Law § 29-0303.7 (McKinney Supp. 1992).

[36] The States of Nevada, South Carolina, and Washington intervened as defendants to protect their interest in increased authority over the disposal facilities within their borders.

5. The court of appeals affirmed, sustaining the 1985 Act (including its take-title provision) against petitioners' various constitutional challenges. Pet. App. 1a-17a. The court found that the national legislative process had operated properly in producing the 1980 and 1985 Acts and that these Acts in fact "are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics." Pet. App. 13a. The court of appeals observed that the LLRW legislation furnished "identical treatment for all states," Pet. App. 15a, and thus preserved "equality in dignity and power among the several states." Pet. App. 15a (citation omitted). The court of appeals similarly rejected petitioners' arguments based on the Eleventh Amendment and the Guaranty Clause. It found that the Eleventh Amendment is not an independent limit on Congress's power to legislate under the Commerce Clause, and that Allegany County's Guaranty Clause argument is "analytically indistinct" from the Tenth Amendment arguments raised by the other petitioners. Pet. App. 16a-17a.

SUMMARY OF ARGUMENT

1. The bulk of the incentives contained in the 1985 Act are clearly constitutional because they do nothing more than condition New York's receipt of federal benefits on its compliance with milestones established in the 1985 Act. The incentive payments, which in substance offer States funds for LLRW disposal if they are proceeding satisfactorily to provide for disposal of LLRW, are permissible under the Spending Power. See *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). Similarly, the Commerce Clause permits Congress not only to issue affirmative regulations of interstate commerce, but to lift prohibitions that the dormant Commerce Clause otherwise would impose. See, *e.g.*, *Northeast Bancorp, Inc.* v. *Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985). Thus, the provisions authorizing compact regions

to exclude or discriminate against out-of-compact LLRW are permissible under the Commerce Clause.

2. Petitioners' only substantial constitutional challenge is to the take-title provision. But that provision will not even take effect until 1996; thus, petitioner's challenge in that respect is not yet ripe. This Court should not assess weighty constitutional questions in a vacuum of factual uncertainty. In any event, the provision is constitutional. Congress's decision to enact the statute, in response to similar proposals from the NGA, shows that this statute is a "parago[n] of legislative success," Pet. App. 13a, not the result of a failed process vulnerable to assault under *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

To the extent *Garcia* leaves open the possibility of a challenge to a federal statute that "commandeers" state processes—an issue identified in *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982)—we believe the Act withstands such a challenge. The Constitution permits the National Government to require States to take some actions in response to problems of interstate dimension. Here, that mandate is quite limited. The 1985 Act does not require the State to enact or enforce any federally mandated regulatory program, and thus does not intrude impermissibly on State sovereignty. To the contrary, like the statute upheld in *FERC*, the 1985 Act leaves the State a number of options. Although it obviously would be permissible for the State to enact an LLRW waste-disposal program, the 1985 Act scarcely forces that particular course upon the State. The State, for example, could choose to construct such a facility itself or, to take the simplest response, contract with a compact to ensure that New York's generators can dispose of their waste elsewhere. Thus, the 1985 Act requires in practical effect nothing more than that the State refrain from foisting its unwanted waste on the rest of the Union. In light of the origin of the problem as a dispute among the States, the requests of the States for a state-oriented solution

and the assiduous care Congress displayed in attending to the interests and concerns of the several States, the Act is a constitutionally permissible example of cooperative federalism designed to preserve, rather than preempt, state authority.

3. The take-title provision is severable from the remainder of the 1985 Act. Invalidation of the entire Act at this point—after New York has received the benefits of its bargain during several years of access to the existing facilities—would deprive the sited compact regions of their portion of the bargain: the ability to exclude out-of-compact waste at a date certain. Whatever Congress would have done if it had known that the take-title provision would be held unconstitutional, it is abundantly clear that it would have done something. The proper approach would be to leave the remaining portions of the 1985 Act in place.

ARGUMENT

I. THE BASIC PROVISIONS OF THE 1985 ACT, WHICH PROVIDE THAT STATES CAN RECEIVE THE FISCAL BENEFITS OF FEDERAL PROGRAMS AND PROTECT PRODUCERS IN THEIR BOUNDARIES FROM THE ADVERSE EFFECTS OF FEDERAL LAW ONLY BY COMPLIANCE WITH CONDITIONS ESTABLISHED BY CONGRESS, ARE PLAINLY PERMISSIBLE EXERCISES OF CONGRESS'S SPENDING AND COMMERCE POWERS

Petitioners contend that the 1985 Act should be declared unconstitutional because it oversteps substantive limits on congressional power. But their broad-based attack on the Act fails to acknowledge the commonplace form of most of the Act's provisions.[37] Except for the

[37] See N.Y. Br. 31 (attacking general statement of state responsibility, 42 U.S.C. 2021d(a)(1), together with take-title provision); Cortland Br. 10, 25 (complaining of "direct orders" pertaining to siting); Allegany Br. 24 (urging that entire Act be struck down without regard to differences in incentive mechanisms); see also

take-title provision (which we discuss in detail in Point II, *infra*), none of the provisions of the Act imposes affirmative obligations on the States. Rather, all of the other incentives set forth in the Act take the form of conditions on the continued receipt by the States (or their generators) of the benefits of federal law, or direct regulation of interstate commerce. Such incentives are plainly constitutional.

A. The Incentive Payments Established by 42 U.S.C. 2021e(d)(2)(B) Are Valid Under the Spending Power

First, subparagraphs (i) through (iv) of 42 U.S.C. 2021e(d)(2)(B) provide for incentive payments to States to encourage them to comply with four specified milestones set forth in the Act. Similarly, Section 2021e(d)(2)(E) limits the uses to which the States can put any such payments they may receive. These provisions fall comfortably within congressional authority, under the spending power,[38] "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota* v. *Dole*, 483 U.S. at 206 (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)).

The spending power is broad but "not unlimited," *South Dakota* v. *Dole*, 483 U.S. at 207; these payments, however, fall comfortably within the range of that power, as explained by this Court in *Dole*. First, the Act was passed as an attempt to resolve the crisis in disposal of LLRW

Amicus Curiae Connecticut Br. 10 n.4 (attacking penalty surcharge provision); Amicus Curiae Michigan Br. 10 ("mandates of the 1985 Act * * compel States to engage in the commerce of disposing of LLRW").

[38] Although Article I, Section 8, Clause 1 of the Constitution does not on its face refer to the power to "spend," this Court regularly has described that clause as including the "spending power." See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. at 206-207.

and thus prevent a shutdown of existing disposal facilities. This manifestly legitimate congressional goal establishes beyond question that Congress authorized the payments in pursuit of "the general Welfare," as described in Article I, Section 8, Clause 1. See *South Dakota* v. *Dole*, 483 U.S. at 207. Second, the provisions of Section 2021e(d)(2)(B) and (d)(2)(E) are clear and specific, so that the Act "enables the States to exercise their choice knowingly." *South Dakota* v. *Dole*, 483 U.S. at 207, quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the 1985 Act's conditions on incentive payments are related to the purposes of the federal program under which the payments are made (see *South Dakota* v. *Dole*, 483 U.S. at 207-208), because the payments arise out of the very statutory program with which the State must comply to receive the payments.

Not only is this exercise of the spending power clearly permissible, but the incentive payments transgress no "independent constitutional bar," whether imposed by the Tenth Amendment or otherwise. See *South Dakota* v. *Dole*, 483 U.S. at 210-211. A requirement that a State take an action on pain of losing federal funds does not run afoul of the Tenth Amendment because "the Federal Government does have power to fix the terms upon which its money allotments to states shall be disbursed. * * * [T]he State could * * * adopt the simple expedient of not yielding to what she urges is federal coercion." *Id.* at 210 (citations omitted). Finally, there is no suggestion that the relatively minor payments involved here are "so coercive as to pass the point at which 'pressure turns to compulsion.'" *Id.* at 211 (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).

B. The Commerce Clause Authorizes Congressional Action That Permits States To Take Action Discriminating Against Interstate Commerce

Various provisions of the 1985 Act also encourage non-sited States to respond to the crisis by allowing regions that have disposal capacity to discriminate against regions that do not. Thus, Section 2021e(d)(1) allows states that host compact-region facilities to impose surcharges on extra-regional waste, and Section 2021e(e)(2) allows these host states to charge penalty surcharges on waste generated in areas that fail to meet the milestones set forth in Section 2021e(e)(1). Most importantly, commencing in 1993, regional compacts with operational disposal facilities ~~compact-region facilities~~ will be free to exclude or discriminate against extra-regional waste in accordance with the terms of their compacts.

These provisions thus accomplish two things: (1) they reward sited compacts by authorizing them to discriminate against interstate commerce, and (2) they encourage States to comply with federal policy in order to shield their generators from the exercise of this discriminatory authority. Enactments such as these fall squarely within the constitutional grant of power "To regulate Commerce * * * among the several States." First, it is well established that the Commerce Power permits Congress not only to enact its own regulations of interstate commerce, but also to "redefine the distribution of power over interstate commerce by 'permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible.'" *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87-88 (1984) (quoting *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)); see, *e.g.*, *Northeast Bancorp, Inc.* v. *Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985). Second, the analysis is no different where the power is delegated not to individual States, but to compacts formed with congressional consent pursuant to the Compact Clause. Indeed, the congressional control inherent in the process of compact approval lessens the possibility of discrimination

that Congress did not intend to authorize. Cf. *Northeast Bancorp.* v. *Board of Governors*, 472 U.S. at 174-175 (rejecting, on grounds of prior congressional consent, Commerce Clause challenge to state statutes creating regional bias in bank ownership restrictions). Finally, for the reasons we have stated discussing the incentive payments, the permitted discrimination does not become unconstitutional simply because Congress allows the State an opportunity to mitigate the financial impact of the discrimination on its generators if the State chooses to act in accordance with federal policy; thus, the penalty surcharge provisions pass muster as well.

II. THIS COURT SHOULD NOT INVALIDATE THE TAKE-TITLE PROVISION, 42 U.S.C. 2021e(e)(2)(C)

Petitioners' most strenuous objections to the 1985 Act (see N.Y. Br. 23-26; Allegany Br. 4-5; Cortland Br. 27-28) are directed at the take-title provision (see 42 U.S.C. 2021e(d)(2)(C)), which provides that States that have not provided for disposal of LLRW generated within their borders by 1996 must, on request of the generator, take title to the LLRW and take possession of the LLRW or assume liability for the generator's involuntary retention of possession. This challenge, however, is not ripe for decision. The provision cannot become effective until 1996, and will have actual effect even then *only* if the other incentives contained in the 1985 Act fail to induce New York to deal with the problem. In any event, the provision passes constitutional muster.

A. Petitioners' Challenge to the Take-Title Provision Is Not Ripe

Although the United States did not argue below that the case as a whole is unripe (see U.S. Br. in Opp. 25), we remain convinced, as we argued in the court of appeals (see U.S. C.A. Br. 42), that petitioners' attack on the take-title provision is premature. The challenge to the take-title provision focuses on remote, highly con-

tingent eventualities. The take-title provision cannot take effect until January 1, 1996, and will have force at that time only if New York has failed, through any of the various options permitted by the 1985 Act, to provide for disposal of LLRW generated within its borders. Thus, because New York is not "immediately threatened with harm" by the take-title provision, *Poe* v. *Ullman*, 367 U.S. 497, 504 (1961) (opinion of Frankfurter, J.), and because it is not at all clear that New York ever will be harmed by the provision, a decision would contravene this Court's established proscription against "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

The minimal current effect of the take-title provision is evident in view of the remaining portions of the Act, which, for reasons we have discussed, are clearly constitutional. The other incentives created by the Act—placing conditions on the State's access to federally provided funds and allowing out-of-State facilities to discriminate against the State's generators—provide a powerful and independent inducement to the State to comply. Nothing beyond speculation can gauge the extent to which the take-title provision adds weight to these already strong incentives. Here, as in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 203 (1983), the fact that the State is not being "uniquely affected" by the provision in question should lead the Court to refrain from adjudicating the constitutionality of this particular provision, even though the Act as a whole is having a considerable current impact.

B. The Take-Title Provision Is Not the Result of a Failure of the National Legislative Process

If this Court considers the constitutionality of the take-title provision, its analysis should begin with the recognition, noted last Term in *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), that this Court's decision in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers." 111 S. Ct. at 2403. Correspondingly, this Court's recent opinions have suggested that federal statutes enacted under the Commerce Clause may transgress constitutional constraints imposed by our federal structure in cases where the legislative process has failed to perform properly. See *Garcia*, 469 U.S. at 556 ("In the factual setting of these cases the internal safeguards of the political process have performed as intended."); *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."). Assuming that this daunting standard could ever be met, see *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911), there can be no serious claim that the 1985 Act fails to withstand scrutiny in this respect.[39] As the court of appeals recognized, the 1980

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[39] In addition to the district court and court of appeals in this case, two other district courts have considered and rejected attacks of this nature on the 1985 Act. See *Concerned Citizens of Nebraska, et al.* v. *United States Nuclear Regulatory Comm'n*, No. CV90-L-70 (D. Neb. Oct. 19, 1990), slip op. 8-9, appeal docketed, No. 91-2784 (8th Cir. Aug. 12, 1991); *Michigan* v. *United States*, 773 F. Supp. 997, 1001-1003 (W.D. Mich. 1991), appeal docketed, No. 91-2281 (6th Cir. Nov. 19, 1991) (appeal held in abeyance by order dated Jan. 17, 1992). Similar attacks on other federal statutes have been rejected without exception. See, *e.g.*, *Nevada* v. *Watkins*, 914 F.2d 1545, 1556-1557 (9th Cir. 1990) (statute identifying Yucca Mountain site in Nevada as sole focus of additional study for high-level radioactive waste repository); *Nevada* v. *Skinner*, 884 F.2d 445, 452 (9th Cir. 1989) (statute linking federal highway funds to state enforcement of 55-mile-per-hour speed limit), cert. denied, 493 U.S. 1070 (1990); *International Ass'n of Fire Fighters, Local 2203* v. *West Adams County Fire Protection Dist.*, 877 F.2d 814, 820-821 (10th Cir. 1989) (requirement under the Fair Labor Standards Act that local government pay firefighters extra for overtime);

and 1985 Acts "are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics." Pet. App. 13a.

The central features of the 1985 Act—state responsibility to provide for disposal coupled with newly created state authority (exercised through membership in an approved interstate compact) to restrict interstate commerce in LLRW for disposal—originated with the States themselves. Indeed, those two features came to Congress in 1980 with the States' unanimous endorsement. States supported this approach in 1980 in order to resolve the dispute between sited and unsited States, and to avert an interruption of vital activities that produce LLRW, in a manner that would enhance state authority over the siting and operation of LLRW disposal facilities. So too, the 1985 Act was enacted with active state participation. The basic changes effected by the 1985 Act—a lengthy extension of access to the three existing sites coupled with strengthened incentives to minimize the odds of another crisis in 1996—again were recommended by the States themselves. Indeed, those changes were intended to salvage the state-oriented approach after the 1980 Act failed to produce the anticipated response from the unsited States.[40]

Nevada v. *Burford*, 708 F. Supp. 289, 300-301 (D. Nev. 1989) (separate challenge to statute designating Yucca Mountain, Nevada, for investigation as high-level waste disposal site), aff'd, 918 F.2d 854 (9th Cir. 1990), cert. denied, 111 S. Ct. 2052 (1991).

[40] Petitioner Cortland County finds the 1985 Act unconstitutional under its "Process Failure Test," because, in its view, the 1985 Act imposed burdens on the State alone, rather than private citizens, and thus "severed the interests of the states from those of private LLRW generators." Cortland Br. 25. To the contrary, the 1985 Act sharply increased costs for private generators. Generators, not States, pay surcharges and penalty surcharges on shipments of LLRW from States and compacts without disposal facilities. 42 U.S.C. 2021e(b) and (d)(1)-(2). Moreover, the exclusionary authority exercised by approved compacts is likely to increase disposal costs, which must be paid by generators, not States. Thus, the Act in fact burdens the interests of generators at least as substantially as it burdens those of the States.

Moreover, it especially ill behooves New York to claim that it was "deprived of any right to participate in the national political process," or left "politically isolated and powerless" by the Act, see *Baker*, 485 U.S. at 513. New York officials testified before Congress that the Empire State supported congressional efforts to provide for an extended period of assured nationwide access to the three existing disposal facilities, subject to "reasonable surcharges," and to set forth "specific and easily identifiable milestones," which could be linked to "appropriate penalties." See *Legislation Hearing*, note 12, *supra*, at 197-199. Moreover, the State concedes that its "congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts." 91-543 Pet. 7. Indeed, Senator Moynihan spoke strongly in favor of the final bill —including the take-title provision—on the floor of the Senate just before the Senate passed the bill. See 131 Cong. Rec. 38,423 (1985) (quoted in note 18, *supra*). Far from failing New York, the national political process afforded the State ample opportunity to participate, as well as an outcome that generally conformed to its own contemporaneous recommendations.

C. The Take-Title Provision Survives Independent Constitutional Constraints Designed To Preserve the Federal Structure

1. *The Take-Title Provision Does Not Impermissibly Commandeer the States' Processes*

Petitioners argue strenuously (N.Y. Br. 15-34; Allegany Br. 10-19; Cortland Br. 9-19) that the take-title provision is unconstitutional because it "commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program," *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*,

452 U.S. 264, 288 (1981). Although this Court has not determined whether this type of "commandeering" challenge survived *Garcia*, see *South Carolina* v. *Baker*, 485 U.S. at 513 (declining to decide whether "commandeering" claims are viable after *Garcia*), we agree with petitioners' submission to the extent that it suggests that grave constitutional questions could be raised by a congressional enactment that required a State to enact and enforce a federally prescribed regulatory program. On the other hand, this Court's decisions establish that the Constitution does permit some types of federal directives addressed directly to the States, especially in areas of intense federal interest. In light of the circumstances giving rise to the legislation at issue, including the grave crisis in interstate disposal of LLRW, the serious dispute among the States out of which the crisis arose, the States' persistent requests for a state-oriented solution, and the alternate ways in which the State can comply with the take-title provision, we believe that the limited requirement imposed by the provision—which does not "commandeer" state officials for enforcement of a federal program—is permitted by the Constitution.

a. The Constitution Permits Some Affirmative Federal Directives to the States.—Affirmative federal directives addressed specifically to the States do not, in all circumstances, upset the constitutional balance between federal and state sovereignty. For example, Congress's power to compel state judges to hear actions brought under federal law is well established. See *Testa* v. *Katt*, 330 U.S. 386, 392-394 (1947); accord *FERC* v. *Mississippi*, 456 U.S. 742, 760-763 (1982); *Palmore* v. *United States*, 411 U.S. 389, 402 (1973). Moreover, although commands to state judges generally may threaten state sovereignty less than commands addressed to state executive officials and legislatures, see *FERC*, 456 U.S. at 762; *id.* at 784-785 (O'Connor, J., dissenting), it is clear that "there are instances where the Court has upheld federal statutory structures that in effect directed state [executive branch officials] to take * * * certain actions." *FERC*, 456 U.S. at 762. The most obvious examples are statutes implementing the Extradition Clause and the Civil War Amendments, which have been held to create valid obligations on state governments.[41]

This Court itself has taken similar action in cases that called for resolution of conflicts regarding the allocation of shared resources among the several States. For example, in *Colorado* v. *New Mexico*, 459 U.S. 176 (1982), the Court observed that its prior decisions in this area had "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Id.* at 185 (citing *Wyoming* v. *Colorado*, 259 U.S. 419 (1922)); see *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940) (threatening Colorado with contempt if its officials failed to meet their obligations "to keep her total diversions from the Laramie River and its tributaries within the limit fixed by the decree").[42] Similarly, the Court has endorsed the creation of federal rules to govern conflicts among the States that arise, like this one, out of efforts of complaining States to prevent States in which waste is generated from allowing waste to be exported beyond their borders. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 106-108 (1972), noting, in the context of water pollution, that federal courts can require States to take affirmative ac-

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[41] See *Puerto Rico* v. *Branstad*, 483 U.S. 219, 227-228 (1987) (state officials can be required to turn over fugitives under extradition legislation implementing the Extradition Clause) (overruling *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861)); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 319-320, 334-335 (1966) (state officials can be required to obtain federal clearance before implementing changes in state voting law under legislation authorized by the Fifteenth Amendment).

[42] See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) (upholding a judicial command to state officials "to prepare a set of rules that will implement the Court's interpretation of the rights of the parties" to a dispute over Indian fishing rights under a federal treaty).

tions to remove conditions that constitute a nuisance to other States); *Missouri* v. *Illinois*, 200 U.S. 496, 520-521 (1906) (a downstream State can seek relief in the Supreme Court to force removal of a nuisance created by an upstream State). See generally *Arkansas* v. *Oklahoma*, No. 90-1262 (Feb. 26, 1992), slip op. 5-6.

If this Court has power to devise federal resolutions to such interstate disputes, then surely Congress—the branch of the national government in which the States are the most directly represented—can do the same under the Commerce Clause.[43] See *Arizona* v. *California*, 373 U.S. 546, 556, 565-566 (1963) (noting Congress's power to allocate water among the several States); *Illinois* v. *Milwaukee*, 406 U.S. at 107 (noting that Congress could preempt federal common law governing interstate pollution); cf. *United States* v. *Oregon*, 366 U.S. 643, 649 (1961) (holding that a federal statute divesting the State's claim of title to personal property through escheat did not transgress the Tenth Amendment).[44] In sum, there is no reason to believe that the Tenth Amendment prevents Congress from imposing directly on States the same kinds of affirmative obligations upon which this Court itself has relied, when it seeks to deal with disputes, such as this one, that inherently pit State against State in a manner that threatens severe disruption of interstate commerce.

b. The Constitutionality of Federal Directives to the States Can Be Supported by the Nature and Intensity of the Federal Interest at Stake.—It scarcely need be said

[43] See *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 953-954 (1982) (suggesting that the Commerce Clause is the source of congressional power to regulate interstate groundwater basins).

[44] In fact, Congress, consistent with the logic of *Arizona* v. *California* and the judicial apportionment cases, has enacted equitable apportionment legislation imposing precisely this kind of affirmative obligation on state officials. See Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, §§ 202(a), 204(d)(1)-(2), 104 Stat. 3294, 3303 (1990).

that the Court's view as to the extent to which the Tenth Amendment restrains congressional power under the Commerce Clause has changed from time to time during recent decades. But at all times—including during the primacy of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)—the Court consistently has recognized that the nature and strength of the federal interest is relevant to the Tenth Amendment analysis. Thus, statutes that affected the sovereignty of the States in ways that otherwise might have been held unacceptable could be upheld if "the nature of the federal interest advanced [was] such that it justifie[d] state submission." *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288 n.29 (1981); accord *EEOC* v. *Wyoming*, 460 U.S. 226, 242 n.17 (1983); *FERC* v. *Mississippi*, 456 U.S. at 764 n.28; *id.* at 778 n.4, 781 n.8 (O'Connor, J., dissenting); *United Transp. Union* v. *Long Island R.R.*, 455 U.S. 678, 684 n.9 (1982); see *National League of Cities*, 426 U.S. at 853 (justifying the Court's acceptance of the statute at issue in *Fry* v. *United States*, 421 U.S. 542 (1975), as resting in part on the fact that the enactment "was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system"). A similar view was urged by the dissenting opinions in *Garcia*. See 469 U.S. at 562-564 (stating that the "seriousness of the problem addressed by the federal legislation" should be "weighed * * * against the effects of compliance on state sovereignty") (opinion of Powell, J., dissenting); *id.* at 588 ("The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States.") (O'Connor, J., dissenting).

c. The Take-Title Provision Is a Permissible Directive to the States.—In light of the principles discussed above, the take-title provision should be held constitutional. Contrary to petitioners' dramatic portrait of the provision as

imposing procrustean restraints on state policy choices, the provision does not require the State to "enact and enforce a federal regulatory program," *Hodel*, 452 U.S. at 288. In fact, the provision is notable for the wide range of the responses that it permits. First, States can meet the responsibility imposed by the Act through the simple act of executing a contract with a sited compact.[45] See 42 U.S.C. 2021c(a)(1), 2021e(e)(1)(F).[46] This approach imposes only a minimal burden, because the State can require generators within its borders to pay the full

[45] For example, Rhode Island and the District of Columbia have used this approach to provide for disposal of the LLRW generated within their borders through 1992 and have been pursuing the possibility of executing access contracts for later years. See *1990 DOE Report*, note 19, *supra*, at 41-42, 45.

[46] Petitioners New York and Allegany County and several of the amici States assert that the 1985 Act requires unsited States to participate in the development of a disposal facility, either alone or as a compact member. See N.Y. Br. 22, 25; Allegany Br. 4; Amici Curiae Ohio, *et al.* Br. 16. Not so. These assertions ignore that the 1985 Act also affords States the option of entering into appropriate access contracts. See 131 Cong. Rec. 38,424 ("[T]his act provides that a nonsited State or compact region may at any time enter into a voluntary agreement with a State that has a disposal facility, which allows the market to work to some degree. The voluntary agreement provisions, along with the surcharge provisions for the 1992-93 period, do introduce a healthy dose of the marketplace into the current situation.") (remarks of Sen. Evans); see also Cortland Br. 5 (acknowledging availability of disposal contract option).

Every compact that has been approved to date authorizes the negotiation of such contracts with unaffiliated, unsited States. Southwestern Compact, Art. III(g)(19), 102 Stat. 4779; Appalachian Compact, Art. 4(B), 102 Stat. 480; Northwest Interstate Compact, Art. V, 99 Stat. 1863; Central Interstate Compact, Art. IV, cl. m.6, 99 Stat. 1868; Southeast Interstate Compact, Art. 4(E)(9), 99 Stat. 1875; Central Midwest Interstate Compact, Art. III, cl. i(1), 99 Stat. 1884; Midwest Interstate Compact, Art. III, cl. h.1, 99 Stat. 1895; Rocky Mountain Compact, Art. VII(c), 99 Stat. 1907-1908; Northeast Interstate Compact, Art. IV, cl. i.11, 99 Stat. 1915.

costs of disposal under any access contract.[47] Second, States can choose to build the disposal facilities, either for themselves or on behalf of a compact region.[48] Third, States (again, on behalf of themselves or compact regions) can choose to allow private parties to construct facilities, subject to State regulation.[49] Moreover, for States that choose to host disposal facilities, technical decisions involving facility design and disposal methods are left to the State's discretion, within broad limits defined by NRC regulations.[50]

[47] Both Rhode Island and the District of Columbia have enacted legislation requiring their generators to pay the full cost of disposal under any access agreement. See D.C. Code Ann. § 6-3704(b) (1989 & Supp. 1991); R.I. Gen. Laws § 23-19.11-1 (1989).

[48] See, e.g., *1990 DOE Report*, note 19, *supra*, at 28-29 (describing Maine's creation of a state agency to site, license, construct, and operate a state-owned facility).

[49] For example, private contractors have been hired to develop and operate disposal facilities in the Southwestern, Central Interstate, Central Midwest, and Appalachian States compacts. See *1990 DOE Report*, note 19, *supra*, at 4-12, 25-26; U.S. General Accounting Office, *Nuclear Waste: Extensive Process to Site Low-Level Waste Disposal Facility in Nebraska* 3-5 (1991).

[50] Surprisingly, petitioner Cortland County complains that the NRC's relatively unconstrained approach has handicapped the States by leaving New York to pursue its preference for alternative disposal methods in a "regulatory vacuum." Cortland Br. 5 & n.6, 11 & nn.8-9. This assertion—which effectively calls for more restrictive federal regulation—is conspicuously absent from New York's own submission. It is true that near-surface disposal is the only disposal technology for which specific technical requirements have been published as a regulation, see 10 C.F.R. 61.50-61.59, but there is no prohibition on the use of other technologies, such as mined cavities, which can be licensed under the general provisions of 10 C.F.R. Pt. 61. Indeed, Congress has sought to encourage alternative approaches. See 42 U.S.C. 2021h (requirement that NRC publish technical guidance on alternatives to shallow land burial); J.A. 92a (affidavit describing guidance); *1990 DOE Report*, note 19, *supra*, at C-1 to C-9 (describing array of DOE technical assistance proj-

Finally, States can determine for themselves the role that their officials will play in licensing and regulating any disposal facilities that they permit within their borders; at their option, they may defer to the NRC or undertake these regulatory functions themselves under authority conferred by the NRC's "agreement-states" program.[51]

Putting the States to a choice among this array of options does not constitute the kind of impermissible commandeering about which the Court expressed concern in *Hodel* and *FERC*. The reason is that the State is not required to enact or enforce a federal regulatory program. Rather, the options outlined above allow the State to comply with the Act without enacting a federally pre-

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ects, including specific assistance to New York through completion of DOE's *Drift Mined Cavity Report*). NRC also has published guidance on below-ground vault and earth-mounded concrete-bunker alternatives. See NRC NUREG 1199, 1200 (Jan. 1988).

[51] Federal-state cooperation in the regulation of nuclear materials was instituted by the 1959 amendments to the Atomic Energy Act. See 42 U.S.C. 2021(b) and (d). These provisions authorize the withdrawal of federal regulatory authority over certain nuclear materials in favor of regulatory programs run by qualified States. See 42 U.S.C. 2021(b). In general, this provision allows qualifying States to regulate all non-federal users of low-level radioactive materials except nuclear reactors and fabricators of fuel. New York was one of the first States to assume regulatory authority under this program. See 27 Fed. Reg. 10,419 (1962); C.A. App. 185-186 (1959 "Atomic Development Plan" for New York State, describing early steps in New York's effort to become an agreement State as part of campaign to promote "the growth of a substantial atomic industry within the state").

The NRC's agreement-states program, together with the reservation to the States in 42 U.S.C. 2021(k) of authority to "regulate activities for purposes other than protection against radiation hazards," see *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205-216 (1983), rebuts Cortland's allegation (Cortland Br. 5) that States have been deprived of "any meaningful authority over the production and environmental control" of LLRW; see Amicus Curiae Connecticut Br. 6 (complaining that the federal government has "displaced the States from regulating").

scribed program. The first option—execution of a contract—can be effected without any significant regulatory activity whatsoever. The second option, construction of a state-owned facility—although it would require a significant commitment of state resources—is qualitatively different from the implementation of federal policies regulating private activity, which would transform state administrative bodies into "field offices of the national bureaucracy." *FERC* v. *Mississippi*, 456 U.S. at 777. Thus, the actions required to exercise this option are not at the core of the concerns identified in *Hodel* and *FERC*. Rather, they resemble much more closely the types of actions Congress and this Court repeatedly have required of States to resolve interstate disputes in the natural resources area. At bottom, Congress has done nothing more here than prohibit New York from allowing its nuclear waste to flow into interstate commerce against the wishes of recipient States; in our view, there is no constitutionally disositive difference between that restriction and a restriction requiring a State to refrain from polluting an interstate stream.

To be sure, the significant commitment of state resources required to comply with this option could raise serious concerns if Congress *required* the States to pursue this course. But the existence of other less burdensome options in this comprehensive program significantly mitigates the burden. Moreover, when the modest level of this intrusion is considered in light of the admittedly grave need for a national resolution to this problem, and the special circumstances that led Congress to choose the course it did, we believe the take-title provision withstands constitutional scrutiny. In the demanding circumstances that form the backdrop for this carefully crafted legislation, only a "curious type of federalism," see *FERC*, 456 U.S. at 766, would hold that Congress was barred from imposing conditions that effectively required the States to take *some* response to the problem, and that Congress instead should have entirely preempted

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the States' authority. In any event, due respect for state sovereignty required by the Constitution should not prevent Congress from requiring the States to live up to the bargain Congress enacted in 1985 (a bargain under which New York already has received more than six years of continued access to the sited States' disposal facilities).

At the same time, we recognize the seriousness of petitioners' concerns[52] that the federal government could seek to evade political accountability for unpopular federal policies through this type of enactment. Those concerns, however, are unfounded here, where the delegation of responsibility to the States was made out of deference to the expressed wishes of the States themselves.[53] There is no constitutional failing in Congress's inability to devise a method by which States could resolve this problem without being held accountable by their citizens. To the contrary, as the court of appeals recognized, the 1985 Act "promot[es] state and federal comity in a fashion rarely seen in national politics," Pet. App. 13a, and reflects a carefully balanced attempt to advance simultaneously the values of governmental responsiveness, democratic participation, and innovation that underlie the constitutional structure of dual sovereignty. See *Gregory* v. *Ashcroft*, 111 S. Ct. at 2399.

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[52] See Cortland Br. 22-23; see also Amicus Curiae Council of State Governments Br. 21-23; Amici Curiae Ohio, *et al.* Br. 14 n.11 (alleging federal interest in placing risk of program failure on States).

[53] Any allegation that Congress sought to avoid federal responsibility also is undermined by the 1985 Act's mandate that the federal government provides for disposal of all greater than Class C wastes, see Section 2021c(b)(1)(D), and establishment of an extensive program of DOE assistance to States involved in siting and developing LLRW disposal facilities, see note 50, *supra*.

2. *The Take-Title Provision Does Not Violate the Guaranty Clause*

Petitioner Allegany County and a number of the amici curiae States contend that the 1985 Act violates the Constitution's provision that the United States shall guarantee to each State a republican form of government, U.S. Const. Art. IV, § 4. Allegany Br. 15; Br. for Amici Curiae Ohio, *et al.* 14-15; Br. for Amicus Curiae Michigan 24-49. To the extent that their submissions adduce the Guaranty Clause as part of the source material for the constitutional principles of federalism discussed above, their argument requires no independent response, as the court of appeals correctly observed. Pet. App. 17a. On the other hand, to the extent that Allegany seeks to identify discrete constitutional limitations on congressional power that are not reflected in the Tenth Amendment cases, its argument is foreclosed. This Court repeatedly has held that separate claims based on the Guaranty Clause are nonjusticiable, whether raised against the States[54] or against the federal government.[55] Moreover, even if Guaranty Clause claims were otherwise justiciable, it is doubtful that the particular claim at issue here could be presented against the United States by a political subdivision of New York where, as in this case, New York itself has declined to press the claim on behalf of its

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[54] See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 223-224 (1962); *Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U.S. 118, 141-151 (1912) (rejecting attack on referendum provision of Oregon Constitution as anti-republican); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 42 (1849) ("it rests with Congress to decide what government is the established one in a State * * * as well as its republican character").

[55] *E.g.*, *Baker* v. *Carr*, 369 U.S. at 224-226; *City of Rome* v. *United States*, 446 U.S. 156, 182 n.17 (1980) (rejecting as nonjusticiable contention that preclearance requirement of the Voting Rights Act violates the Guaranty Clause); *Georgia* v. *Stanton*, 73 U.S. (6 Wall.) 50, 76 (1868) (challenge to Military Reconstruction Act concerns "political rights, which do not belong to the jurisdiction of a court").

citizens. See *New Jersey* v. *City of New York*, 345 U.S. 369, 372-373 (1953) ("[T]he state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens. * * * Otherwise, a state may be judicially impeached on matters of policy by its own subjects."); cf. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923).

III. THE TAKE-TITLE PROVISION IS SEVERABLE FROM THE REMAINDER OF THE 1985 ACT

If, notwithstanding the foregoing, this Court determines that the take-title provision violates constitutional protections of state sovereignty, it should sever the take-title provision from the remainder of the 1985 Act. That provision is entirely independent from the Act's other incentives for States to provide for disposal of LLRW generated within their borders, and from the various other provisions of the Act that impose no discernible burdens on the State at all. See notes 20, 53, *supra*. A State may ignore the pre-1996 interim deadlines entirely and still avoid the burden of the take-title provision by meeting the 1996 deadline. Alternatively, it may meet all of the milestones and still fail to provide for disposal by the final deadline. Because there is no indication that Congress intended for these provisions to apply only in conjunction with the take-title requirement, the constitutionality of these provisions should be assessed independently.

"Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of intent." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); see *id.* at 692 (opinion of Powell, J.). "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932) (*quoted in Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987)). As this Court has explained, this rule applies even in the absence of a severability clause, because "Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 685. Accordingly, if the constitutionally unobjectionable part of a statute can function independently in the manner anticipated by Congress, then "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Ibid.*

Although Congress (and particularly the Senate), viewed the take-title provision as an important incentive device, there is no indication that majority support for the Act hinged on its inclusion. The bill that the House enacted by unanimous roll-call vote on Deecember 9, 1985, contained all of the principal components of a legislative proposal that had been agreed to by the sited States and unsited States earlier in the year.[56] Neither the proposal nor the House bill included a take-title provision. The Senate amendments to that bill, which strengthened the Act's incentives by adding the take-title provision and a fourth milestone (the January 1, 1992, deadline for completed license applications), embodied a compromise between approaches developed by two Senate Committees. To be sure, supporters of the compromise in both chambers of Congress, striving on the last day of the session to complete legislation that would avert the threatened shutdown of existing disposal facilities, emphasized the del-

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[56] See 131 Cong. Rec. 35,197 (1985); *Waste Hearing*, note 12, *supra*, at 155 (testimony of South Carolina Gov. Riley); *id.* at 191 (outline of compromise package). Although the House bill softened the milestone incentives in this package by substituting penalty surcharges for denials of access in certain circumstances, the sited States were willing to accept this modification. See *Disposal Hearing*, note 13, *supra*, at 253.

icacy of the inter-Committee compromise.[57] But these comments do not demonstrate that the viability of the Act turned on this provision.[58] To the contrary, in brief discussion of the constitutionality of the take-title provision, it was presumed, without eliciting any challenge or contradiction, that the provision was severable.[59]

Moreover, New York's argument that the take-title provision is not severable fails to consider the implications of wholesale invalidation of the 1985 Act. Because Congress's consent to all of the compacts has been "granted subject to the provisions of the Low-Level Radio-

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[57] See 131 Cong. Rec. 38,414-38,416 (1985) (descriptions of negotiations between Senate Committees) (remarks of Sens. Johnston and McClure); *id.* at 38,115 ("[T]he Senate has been involved in internal negotiations * * * for a number of weeks. The bill they sent to us today is a tenuous settlement which we understand is acceptable both to States with low-level waste disposal capacity, and to those States needing disposal capacity until new sites can be developed.") (remarks of Rep. Udall); *id.* at 38,115 ("The amendments now under consideration are the result of a delicately crafted compromise which enjoys almost universal support.") (remarks of Rep. Bonker); *id.* at 38,116 ("I support the action today as a reasonable compromise on the low-level waste issue.") (remarks of Rep. Markey); *id.* at 38,118 ("[T]he bill we act on today is a fundamental compromise worked out by the two committees, that would be the subcommittees in the House, and also by our good friends in the Senate.") (remarks of Rep. Dingell).

[58] The efficacy of the 1985 Act even apart from the take-title provision is apparent from the legislative history and text of the legislation that New York enacted in 1986 in response to the Act. As the discussion above makes clear, see pages 16-17, *supra*, state agencies and the legislature itself justified the State's enactment by reference to the costs to the State of a loss of access for New York LLRW generators, making no mention of the take-title requirement.

[59] Representative Markey commented: "Because the provision comes in only in 1996 or 1993, it is intended that the provision be severable from the rest of the act, should it be found unconstitutional." 131 Cong. Rec. 38,117 (1985).

active Waste Policy Act," as amended,[60] the logic of New York's position—calling for invalidation of the entire package of amendments to the LLRW Policy Act—would lead to the invalidation of all of the compacts, whether approved in the second title of the 1985 Act or in subsequent legislation.[61] Thus, the compacts would be unable to exercise any legal authority for which congressional approval was required under the Commerce Clause, including, at a minimum, any authority to discriminate against interstate waste on the basis of its geographic origin. The consequences of wholesale invalidation for the compact system that Congress, at the States' behest, has been seeking to encourage since 1980 provide further evidence that Congress did not intend for the entire Act to stand or fall with the take-title provision. The serious ramifications of the crisis before Congress in 1985 make it clear that, whatever Congress would have done if it had known that the take-title provision was impermissible, it plainly would have done something. In these circumstances, it cannot fairly be said to be "evident that the Legislature would not have enacted those provisions

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[60] See Southwestern Compact Consent Act, § 3(2), 102 Stat. 4773; Appalachian Compact Consent Act, § 3(2), 102 Stat. 471; Omnibus Compact Act, § 212(2), 99 Stat. 1860.

[61] Each of the existing compacts contains a severability provision through which member States agree to abide by the remaining provisions of their agreements in the event of partial invalidation. See Southwestern Compact, Art. VIII, 102 Stat. 4782; Appalachian Compact, Art. 5, 102 Stat. 481; Northwest Interstate Compact, Art. VII, 99 Stat. 1863; Central Interstate Compact, Art. IX, 99 Stat. 1871; Southeast Interstate Compact, Art. 9, 99 Stat. 1880; Central Midwest Interstate Compact, Art. X, 99 Stat. 1892; Midwest Interstate Compact, Art. X, 99 Stat. 1902; Rocky Mountain Compact, Art. IX, 99 Stat. 1909; Northeast Interstate Compact, Art. X, 99 Stat. 1924. None of these provisions, however, indicates that the compact is intended to continue functioning—to the extent permitted by the Compact and Commerce Clauses—following a revocation of congressional approval.

which are within its power," *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. at 684 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976)). Accordingly, if, contrary to our submission, this Court concludes that the take-title provision is unconstitutional, it should hold the take-title provision severable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, and THE COUNTY OF CORTLAND, NEW YORK

Petitioners,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did congressional enactment of the Low-Level Radioactive Waste Policy Act of 1980, and its 1985 Amendments, which ratifies and implements the unanimous agreement of all the states of the Union to fairly allocate the responsibility for the nation's low-level radioactive waste disposal capacity among themselves, violate the Tenth Amendment or the Guarantee Clause, Article IV, § 4 of the United States Constitution?

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NOS. 91-543; 91-558; 91-563
Consolidated

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, and THE COUNTY OF CORTLAND, NEW YORK

Petitioners,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS, STATES OF WASHINGTON, NEVADA AND SOUTH CAROLINA

STATEMENT OF THE CASE

A. Introduction

The states of Washington, Nevada, and South Carolina (sited states) have been the hosts of the only operating low-level radioactive waste[1] disposal sites since 1978. In 1980 and again in 1985, the state of New York and the other states of the Union entered into an agreement with the sited states to fairly and equitably share the burden of low-level radioactive waste disposal. The agreement among the states was unanimously ratified by Congress and is commonly known as the Low-Level Radioactive Waste Policy Act of 1980 and the Low-Level Radioactive Waste Policy Amendments Act of 1985. Despite its comity in 1980 and 1985, by virtue of this lawsuit the state of New York now challenges the validity of, and seeks to rescind, the agreement encompassed in the 1980 Act and the 1985 Amendments Act. We begin by describing the history of low-level radioactive waste disposal in the United States.

B. History of Disposal

In the 1940s and the 1950s, low-level radioactive waste generated in the United States was regulated solely by the federal government and was primarily disposed of in the ocean. After studies in the 1950s raised questions regarding the efficacy of ocean dumping of low-level radioactive waste, the practice was slowly phased out. In 1959, Congress amended the Atomic Energy Act, Pub. L. No. 86-373, codified as amended, 42 U.S.C. § 2021, in order to engage the states in a partnership recognizing the states' interests in

[1]Low-Level radioactive wastes include materials contaminated with small amounts of radioactive substances, such as clothing, packaging, animal carcasses, medical fluids, power reactor liquids, luminous watch dials, smoke alarms, research and diagnostic materials. These wastes need to be isolated from humans for between 60 to 500 years. *Low-Level Waste: A Program for Action, Final Report of the National Governor's Association Task Force on Low-Level Radioactive Waste Disposal (July, 1980).* Joint Appendix, 110a.

the peaceful uses of nuclear materials. Based on the 1959 Amendments, the Atomic Energy Commission granted the requests of "Agreement states" to regulate the disposal of low-level radioactive waste. A land-based disposal regimen began in 1962 when the nation's first site for the land disposal of commercial low-level radioactive waste was licensed and opened in Beatty, Nevada.[2]

Between 1962 and 1971, five more commercial low-level waste disposal sites were opened in the United States at Maxey Flats, Kentucky (1963), West Valley, New York (1963), Hanford, Washington (1965), Sheffield, Illinois (1967) and Barnwell, South Carolina (1971).[3] The Illinois, Kentucky, and New York facilities closed between 1975 and 1978 due to technical water management problems.[4] Since 1979, the only established and open disposal sites for low-level radioactive waste are those located in Washington, Nevada, and South Carolina; the rest of the country transports its low-level radioactive waste to these states.

The obvious risks inherent in this limited disposal system became acute in 1979 when the state of Nevada twice temporarily closed the Beatty site due to the improper handling within the state of several low-level radioactive waste shipments being sent to the site. In October 1979, similar transportation and packaging problems caused the governor of Washington to temporarily close the Hanford site.[5] The closures of the Nevada and Washington disposal sites caused the share of low-level waste being accepted in South Carolina to rise to 80 percent of the entire nation's low-level waste. Because of this result, the governor of South Caroli-

[2]M. Burns, Low-Level Radioactive Waste Regulation (1988), pp. 28-40.

[3]H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 17, *reprinted in* 1985 U.S. Code Cong. & Ad. News at 3005.

[4]Id. at 3006.

[5]Id.

na ordered the Barnwell site to accept only one-half the annual amount of waste that it was then receiving.[6]

The inadequacy of existing disposal capacity for low-level radioactive waste was at this time a major concern of both the sited and unsited states. A national disposal system with only three sites for waste from all 50 states was extremely vulnerable to widespread health and safety crises.[7]

The sited states were particularly unhappy with the inequities of the existing situation. The sited states believed it was unfair that they be required to provide disposal facilities for all 47 of the unsited states. In addition to the limitation imposed by the South Carolina governor in 1979, the voters in the state of Washington approved a ballot initiative in 1980 that banned out-of-state low-level radioactive waste from Hanford.[8]

C. 1980 State Agreement

In the wake of this crisis, Congress began to consider federal solutions to the problem. Congress initially proposed a policy to construct low-level radioactive waste disposal facilities on federal land in several states.[9] However, *the states* asked that Congressional action be deferred in order to allow *the states* to develop a low-level radioactive waste disposal policy. The states, *in the interest of federalism*, preferred that they be in charge of the low-level waste disposal problem, since siting waste disposal facilities involved land use and public health issues traditionally decided at the state and local level of government. Congress agreed to defer to the states wishes. Given this opportunity

[6]*Id.* See also Affidavits of Governors Gardner, Campbell and Miller. Joint Appendix, pp. 142a-155a.

[7]*Id.*

[8]The initiative was declared unconstitutional. *See Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

[9]Low-Level Nuclear Waste Burial Grounds: Hearing Before the Subcommittee on Energy Research and Production, House Committee on Science and Technology, 96th Cong., 1st Sess. 2 (1979).

by Congress, the states acted with alacrity. The National Governors Association (NGA) created a task force to review and formulate state policy regarding low-level radioactive waste. Another state-composed organization called the State Planning Council on Radioactive Waste Management, recommended to President Carter that the national policy on low-level radioactive waste should be that every state is responsible for the disposal of low-level radioactive waste generated within its boundaries, and that states may enter into interstate compacts to carry out the responsibility.[10]

Based on the states' recommendation, President Carter, therefore, did not endorse his administration's earlier proposal for a possible federal takeover of the low-level radioactive waste disposal problem. Rather, President Carter supported the actions already taken by the governors to promote solution of this problem at the state level.[11] The National Conference of State Legislatures and the National Governors Association also adopted this recommendation. The NGA Task Force concluded that the siting of low-level radioactive waste facilities involved primarily state and local land use and public health issues and should be resolved at those governmental levels.[12]

Thus the states themselves developed the policy which recommended solving the problem of low-level radioactive waste disposal capacity on a regional basis, whereby several states would enter into interstate compacts to establish a new disposal facility for waste generated only within the Compact region. In compliance with the states' recommendations, Congress enacted the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, which was codified at 42 U.S.C. §§ 2021b-2021d (1980 Act).[13]

[10]1985 U. S. Code Cong. & Ad. News at 3007.

[11]E. Colglazier, Jr., *The Politics of Nuclear Waste* (1982), p. 38.

[12]1985 U.S. Code Cong. & Ad. News at 3007.

[13]*Id.*

The 1980 Act gave the regional interstate Compacts the authority to restrict, after January 1, 1986, use of the regional disposal facility only to low-level radioactive waste generated within the region. In effect the "unsited" states agreed to a deadline of January 1, 1986 to establish their own disposal facilities.[14]

D. 1985 State Agreement

As 1986 approached, the states began to realize that finding sites within the unsited regions probably could not be accomplished by the deadline, although significant progress was achieved in developing regional interstate disposal Compacts. Thirty-nine states had entered into seven compacts by 1985, but progress on achieving Congressional ratification of the compacts was slowed by the fact that only the Northwest,[15] Southeast[16], and Rocky Mountain Compact[17] states would have had disposal capacity available as of January 1, 1986; the other non-sited compact and individual states would not have had any place to send their waste for disposal after that date. The state-generated process envisioned in the 1980 Act was grinding to a halt, creating a crisis similar to that which had existed in 1979.[18]

The sited states threatened that they would close their facilities to all waste if Congress did not pass acceptable state-generated legislation by January 1, 1986. The states again under the auspices of the National Governors Association took the lead and developed compromise legislation under which the states of Washington, South Carolina, and Nevada agreed to continue to accept all of the nation's low-

[14] *Id.*

[15] The Northwest Interstate Compact includes Washington, Oregon, Idaho, Montana, Utah, Alaska, and Hawaii.

[16] The Southeast Compact includes South Carolina, North Carolina, Virginia, Tennessee, Mississippi, Alabama, Georgia, and Florida.

[17] The Rocky Mountain Compact includes Nevada, Wyoming, Colorado, and New Mexico.

[18] 1985 U.S. Code Cong. & Ad. News at 3007.

level radioactive waste for an additional seven years in exchange for incentives and penalties that would better guarantee that new sites would be developed in the unsited states.[19] The state-generated and approved National Governors Association proposal served as the foundation for Congressional action. In 1985, Congress took the state-developed compromise and unanimously passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Amendments Act), thereby averting a national low-level radioactive waste disposal crisis. All of the sited and unsited states, including New York, strongly urged Congress to adopt the states' agreement. On December 19, 1985, the compromise legislation passed unanimously and seven interstate compacts were ratified.[20]

The 1985 compromise legislation required that the unsited states meet specified milestones during the interim access period from 1986-1992, in order for the waste generators within their borders to receive continued access to disposal facilities. The sited states would be permitted, on an annual basis, to cap the amount of waste disposed of at their facilities and they would also be permitted to impose fixed monetary surcharges on any waste accepted for disposal from outside their respective regions.[21]

The 1985 Amendments Act creates several incentives for the unsited states to develop low-level radioactive waste disposal sites. Under the compromise, the sited states and compacts are authorized to discriminate in interstate commerce by charging higher disposal fees to waste originating from outside the sited states or compact region. 42 U.S.C. § 2021e(d)(1). Unsited states and compact regions are authorized to receive a refund of 25% of the disposal surcharge fees to assist in disposal site construction costs. 42 U.S.C. § 2021e(d)(2). Furthermore, the sited states may deny access

[19] *Id.* at 3008.

[20] 131 Cong Rec. H38115-38120; S38403-38425.

[21] 1985 U.S. Code Cong. & Ad. News at 3008-3009.

to waste originating from a state or region which is not complying with milestones established to show that a state or region is making progress to site a disposal facility. 42 U.S.C. § 2021e(f). Interstate compacts retain the right to restrict access from out-of-region waste. 42 U.S.C. § 2021d(c). Finally, should the states not adhere to the agreed schedule, the states agreed to "take title" to the waste after 1996. 42 U.S.C. § 2021e(d)(2)(C).

Under the 1985 Amendments Act, significant progress has been made by several states and Compacts in developing new low-level radioactive waste disposal capacity. The states of California, Arizona, North Dakota, and South Dakota have formed the Southwest Compact, with California as the host state. Illinois is the host state of the Central-Midwest Compact, made up of Illinois and Kentucky. Nebraska is the host state of the Central Compact, which includes Nebraska, Kansas, Oklahoma, Arkansas, and Louisiana. The Appalachian Compact with Maryland, Delaware, West Virginia, and Pennsylvania is siting a disposal facility in Pennsylvania. Ohio is the host state of the Midwest Compact,[22] which includes Ohio, Indiana, Missouri, Iowa, Minnesota, and Wisconsin. Texas is a "go-it-alone" state, developing its own disposal site without a regional compact. Each of these Compacts and states has made significant progress toward development of operational low-level radioactive waste disposal facilities in compliance with the 1985 Amendments Act. California, Nebraska, and Illinois have submitted license applications for their disposal facilities to the Nuclear Regulatory Commission. Califor-

[22]Originally Michigan was the host state of the Midwest Compact. However, because of Michigan's failure to proceed to site a disposal facility, the Midwest Compact has expelled Michigan from the Compact and the sited states have denied disposal access to Michigan-generated waste for its failure to continue to comply with the 1988 milestone. *See Michigan Coalition v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991) and *MICHRAD v. Griepentrog*, No. 91-1801 (6th Cir. Jan. 24, 1992) (1992 WESTLAW 8818).

nia expects its new disposal facility to be operating before the end of 1992. Joint Appendix, pp. 142a-155a.

In addition, pursuant to the contracting provision[23] of the 1985 Amendments Act, the Northwest Compact and the Rocky Mountain Compact have negotiated a proposed agreement whereby the states of Nevada, Wyoming, New Mexico, and Colorado will have access to the disposal site located in Washington after December 31, 1992. This agreement furthers the 1985 Amendments Act policy to regionalize disposal capacity.[24]

The probability that this process of federalism will result in the orderly development of new low-level radioactive waste disposal capacity throughout the nation has been central to the sited states' decision to provide continued access to the disposal sites for the disposal of low-level radioactive waste generated outside the sited states, pursuant to the states' agreement embodied in the 1985 Amendments Act. Joint Appendix, pp. 142a-155a.

E. Procedural History

In February 1990, the state of New York and the counties of Allegany and Cortland brought suit against the United States in the United States District Court for the Northern District of New York to have the consensus legislation of the 1980 Act and its 1985 Amendments declared unconstitutional. Though it had been part of the unanimous agreement of the states to be responsible for low-level radioactive waste disposal, in the intervening years the state of New York had succumbed to those who say "Not in my backyard."[25] The states of Washington, Nevada, and South Carolina intervened by right, pursuant to Fed. R. Civ. P.

[23] 42 U.S.C. § 2021e(e)(1)(F).

[24]Joint Appendix, pp. 142a-155a.

[25]The "Not in my backyard" or NIMBY syndrome is ubiquitous and regularly thwarts siting essential but unwanted public facilities. *See* Rabe, *Low-level Radioactive Waste Disposal and the Revival of Environmental Regionalism in the United States*, 7 Envtl. & Plan. L. J. 171 (1990).

24(e), in order to have the consensus agreement embodied in the 1985 Amendments Act upheld.

Upon motions and cross-motions for summary judgment and dismissal, the district court held that the 1985 Amendments Act was constitutional under the Tenth Amendment and related concepts of federalism. *New York v. United States*, 757 F. Supp. 10 (N.D.N.Y. 1990). On appeal the United States Court of Appeals for the Second Circuit affirmed, concluding that the state-generated 1980 Act and its 1985 Amendments were "paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics." *New York v. United States*, 942 F.2d 114, 119 (2nd Cir. 1991). This Court granted certiorari on January 10, 1992.

SUMMARY OF THE ARGUMENT

The premise of New York's challenge to the 1980 Act and its 1985 Amendments is false. New York mischaracterizes the issue before this Court as if Congress directed or forced the states to be responsible for the disposal of low-level radioactive waste. New York attempts to create the impression that such responsibility was foisted upon unwilling states by the federal government, or that the states were commandeered by Congress to assume this responsibility. This characterization is illegitimate, purposefully deceptive, and specious.

Both the 1980 Act and its 1985 Amendments are properly characterized as a voluntary policy agreement among the sovereign states to be responsible for the disposal of low-level radioactive waste on a regional and equitable basis. Congress, for reasons of federalism, deferred to the states to generate the consensus agreement to solve the low-level radioactive waste disposal crises in 1980 and 1985.

Under principles of federalism embodied in the Constitution, the states are entitled to enter into agreements among themselves which can then be ratified and enacted by Congress. The 1980 Act and its 1985 Amendments

are paragons of federalism—Congress deferring to a consensus of all of the states to take responsibility for solving the problem of low-level radioactive waste management.

ARGUMENT

POINT I

THE STATES, CONSISTENT WITH THE TENTH AMENDMENT, UNANIMOUSLY AGREED TO BE RESPONSIBLE FOR LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT.

A. The 1980 Act and its 1985 Amendments Are Models of Cooperative Federalism.

The state of New York and two of its counties ask this Court to review the constitutionality of the Low-Level Radioactive Waste Policy Act of 1980 and its 1985 Amendments. The petitioners' theory is that the Acts interfere with New York's sovereign powers and thus violate principles of federalism under the Tenth Amendment of the United States Constitution.[26] New York argues that the 1980 Act and the 1985 Amendments are Congress's action to foist upon "unwilling" states the unwanted responsibility for managing low-level radioactive waste. The premise of New York's argument is false.

> The passage of the Low Level Radioactive Waste Policy Act in December 1980 established a sound policy framework on which to rebuild an equitable and stable regional [waste] management system. The act was the culmination of a year-long effort by several state officials and organizations, including the National Governor's Association and the State Planning Council, to persuade the federal government to let each state be responsible for assuring the safe management of the

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[26]Although the Petitioners' claim that the Guarantee Clause, Art. IV, § 4 of the United States Constitution is also violated, this Court has consistently held that challenges to legislation based on the Guarantee Clause are not justiciable. *City of Rome v. United States*, 446 U.S. 156, 182 n. 17 (1980); *Baker v. Carr*, 369 U.S. 186, 228-29 (1962).

commercial low-level waste generated within its borders. Through asserting their own self-interest by temporarily closing sites and forcing volume reductions, the three states with operating dumps eventually convinced other states, the generators, and the Congress that a lasting solution to the problem of opening new sites was needed, that it should not come from accepting commercial waste at federal sites, and that states could develop the competence to do the job. The fact that the generators include hospitals and research institutions (generating 25 percent of the volume in 1978), industry (24 percent) as well as commercial power reactors (43 percent), and that these generators maintained a united front in their aggressive lobbying was a contributing factor in persuading other state governments to focus on the issue. The spectre of a possible curtailment of essential and popular services proved to be a powerful incentive to responsible action. *But an essential ingredient was the federal government allowing states to generate their own appropriate role and, thereby, to develop a promising solution to a national problem.*

E. Colglazier, Jr., *The Politics of Nuclear Waste* (1982), pp. 202-203 (footnotes omitted) (emphasis added).

Each state as sovereign within its domain, governing its own citizens, and providing for their general welfare asked Congress to defer to the states' sovereign desire to be responsible for low-level radioactive waste generated within their respective borders. The constitutional structure contemplates "an indestructible Union, composed of indestructible states," a structure under which the state and national governments retain a "separate and independent existence." *Texas v. White*, 74 U.S. 700, 725 (1869); *Lane County v. Oregon*, 74 U.S. 71, 76 (1869). Surely the constitutional structure, as contemplated by the Framers, allows the states, as sovereigns, to step forward and agree among themselves as separate, independent, and indestructible entities to solve a national problem. To rule that the states may not so agree would be to "directly displace the States' freedom to structure integral operations" in an area that prior to 1959 was exclusively the province of the national

government. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

Pursuant to the agreement embodied in the 1980 Act and the 1985 Amendments Act, the states have enacted a model of cooperative federalism that allows the states to experiment with various methods of low-level radioactive waste management.

> Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth.

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring and dissenting). The 1980 Act and its 1985 Amendments are examples of such experimentation.

> *Decentralized regulation of low-level radioactive wastes in the United States constitutes an experiment in regulatory federalism that will test the popular propositions that States can resolve complex environmental problems and that multi-State, regional institutions can serve an effective intermediary role between State and nation.* Under the Low-Level Radioactive Waste Policy Act 1980 (U.S.) and its 1985 amendments, States have received the authority from Congress to enter into interstate compacts to manage disposal of low-level radioactive wastes. The legislation gives States the option of managing their own wastes or forming partnerships with neighboring States, but does impose a series of deadlines, incentives, and sanctions that are intended to accelerate the decision-making process and encourage States to work together in co-operative fashion. It stands as a novel experiment that, if successful, might warrant emulation in other Federal Nation-States such as Australia, Canada, and West Germany or the Federating Nation-States of Western Europe.

Rabe, *Low-level Radioactive Waste Disposal and the Revival of Environmental Regionalism in the United States*, 7 Envtl. and Plan. L. J., 171-80 (1990) (Emphasis added).

In this sense, the states provided the impetus for legislation which would legitimize their responsibility for the creative management and disposal of low-level radioactive

waste. Through interstate compacts, permanent arrangements among the states could be established for the management and disposal of such waste. Congress was quite agreeable in deferring to the auspicious desire of the states, its partners in American federalism, to experiment in this area.

> That the States pressured the federal government to turn the low-level waste dilemma over to them fully reflects the resurgence of the States as political actors within the drama of American federalism.

Kearney and Stucker, *Interstate Compacts and the Management of Low-Level Radioactive Waste*, 45 Public Administration Review 218 (1985).

In addition to promoting experimentation, federalism increases the opportunity of the states to participate in governing.

> It is incontestably true that the love and habits of republican government in the United States were engendered in the townships and in the provincial assemblies. [I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large.

1 A. de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961).

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controlled by itself.

The Federalist No. 51, at 351 (J. Madison) (J. Cooke ed. 1961).

The states thus retain substantial sovereign authority under our constitutional system. *See Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Surely the states, under our system of dual sovereignty to which Madison and de Tocqueville were referring, retain the sovereign right to take control of and responsibility for a national problem which affects state and local interests when the states unanimously agree on a solution to that problem.

"It may safely be received as an axiom in our political system, that the state governments will in all possible contingencies afford complete security against invasions of the public liberty by the national authority." The Federalist No. 28, at 179-80 (A. Hamilton) (J. Cooke ed. 1962). While the states have been successful in working through their own executive, legislative, and judicial branches to thwart national policies with which they disagree, there is evidence that at least in some policy fields, such as low-level nuclear waste management, the states are acting in a progressive manner in confronting the problems which face them, and insisting on the right to participate more actively in making national policies which promote and protect what the states perceive to be in their best interests. Kearney and Gary, *American Federalism and the Management of Radioactive Wastes*, 42 Public Administration Review 14-24 (1982). The 1980 Act and its 1985 Amendments are models of the resurgence of the states as political actors in the American federal system.

B. The Political Process Test of Garcia.

The Second Circuit Court of Appeals, below, properly deferred, under the Tenth Amendment and principles of federalism, to the agreement of all the states, including New York, which supported the national political process in creating the Low-Level Radioactive Waste Policy Amendments Act of 1985. New York fails to show that the Second Circuit is out of step with Tenth Amendment analysis of its sister circuits or this Court.

The Tenth Amendment limits on Congress' authority to regulate the states were set out by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). "*Garcia* holds that the [Tenth Amendment limits on Congress' authority to regulate state activities] are structural, not substantive, *i.e.*, that states must find their pro-

tection from Congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, 485 U.S. 505 (1988).

This Court in *South Carolina v. Baker* went on to state that

> although *Garcia* left open the possibility that some extraordinary defects in the national political process might render Congressional regulation of activities invalid under the Tenth Amendment, * * * nothing in *Garcia* or the Tenth Amendment authorizes courts to second guess the substantive basis for legislation. Where * * * the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.

Id. at 512-513. This court observed that

> South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.

Id.

The several Circuits of the Court of Appeals have not found it difficult to apply the *Garcia* test. The United States Court of Appeals for the Ninth Circuit recently construed the Tenth Amendment consistent with both *Garcia* and *Baker* in a case dealing with the siting of a disposal site for high-level nuclear waste in *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1105 (1991). In that case, Nevada argued that

> because Nevada was not represented on the House and Senate Conference Committee on the Omnibus Budget Reconciliation Act of 1987 when the 1987 [Nuclear Waste Policy Act] amendments were approved, it was deprived of its 'right to participate in the national political process' and 'was singled out in a way that left it politically isolated and powerless.'

Id. at 1556 (quoting Petitioners' Opening Brief at 40, quoting *South Carolina v. Baker*, 485 U.S. at 512).

The Ninth Circuit Court of Appeals rejected Nevada's arguments and focused on the national political process in the factual setting presented:

> Nevada cannot point to any defect in the political process that led to the enactment of the 1987 NWPA Amendments. As the Secretary points out, the Tenth Amendment does not protect a state from being outvoted in Congress. * * * Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process. To the extent that Nevada asserts that lack of representation created a defect in the political process as contemplated by *South Carolina v. Baker*, it cannot succeed in light of the plenary consideration given to the Omnibus Budget Reconciliation Act of 1987.

Id. at 1556-1557.

Based on the foregoing, it is clear that *Garcia* properly limits courts to an examination of the national political process "in the factual setting" presented, in order to determine whether Congress has transgressed the Tenth Amendment in the exercise of its Commerce Clause powers. *See Garcia*, 469 U.S. at 556. That is, *Garcia* permits a procedural examination of the national political process and not a substantive review of Congressional actions under a *Garcia* exception.

In this case, rather than being denied the opportunity to participate in the national political process, the state of New York actively sought the legislative consensus that became the 1985 Amendments Act.[27] The specific views of the state of New York were aired during Congressional hearings on the Act. In particular on March 7, 1985, Mr. Charles R. Quinn, Deputy Commissioner for Policy and Planning of the New York State Energy Office, testified

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[27]The states' agreement embodied in the 1985 Amendments Act and 1980 Act distinguishes this case from *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1979), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 U.S. 99 (1977). In the EPA case there was no evidence that the states, as sovereigns, had consented to the challenged EPA regulations.

> New York State supports the efforts * * * to resolve the current impasse over Congressional consent to the proposed low-level radioactive waste compacts * * * New York State has been participating with the National Governors Association * * * in an effort to * * * reach a consensus between all groups.[28]

According to Mr. Quinn's testimony, one of the "major points which [New York] believes must be incorporated within any Congressional Act on this matter" was "appropriate penalties * * * for failure to meet designated milestones."[29]

The take-title penalty provision was devised by the Senate Environment and Public Works Committee and accepted by the NGA and the states.[30] New York State was not isolated when Congress added that provision to the 1985 Low-Level Radioactive Waste Policy Amendments Act. Senator Moynihan of New York was a member of that committee. Just before passage of the 1985 Amendments Act, Senator Moynihan strongly supported the bill

> Mr. President, the low-level nuclear waste bill before us is a well-balanced compromise, and a most necessary one. Without clear action by the Congress, the governors of the three states that have been disposing of all of our commercial low-level nuclear waste have threatened to shut down the disposal sites in their states. I cannot say that I blame them. * * *
>
> I am pleased to report that this complex bill meets those conflicting needs very well. * * *

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[28]Amendments to the Federal Low-Level Radioactive Waste Policy Act of 1985: Hearings on HR 1083 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong., 1st Sess. 197 (1985).

[29]*Id.* at 197-198

[30]Although the Petitioners challenge the Amendments Act as a whole, they focus especially on the "take title provision," 42 U.S.C. § 2021e(d)(2)(C) which requires States to take title to the waste if they have not made arrangements for a disposal site by January 1, 1996. *See* 131 Cong. Rec. S38405.

> The timetables required by this measure are firm and realistic. It is indeed an equitable approach for all concerned, and I am pleased to support it.[31]

No member of the New York State Congressional Delegation opposed the provision, and the bills containing the take-title provision were unanimously passed by both the Senate and the House by voice vote. The state of New York cannot seriously argue that the 1980 Act and its 1985 Amendments, which were the very model of federalism in action, are now somehow defective under the Tenth Amendment.[32]

POINT II

THE "TAKE TITLE" PROVISION OF THE AMENDMENTS ACT IS NOT INDISPENSABLE TO THE REGIONAL DISPOSAL SOLUTION ENVISIONED BY THE STATES AND IS THEREFORE SEVERABLE FROM THE REMAINDER OF THE AMENDMENTS ACT.

While the sited states do not concede that the "take title" provision is constitutionally defective, the provision should be severed from the 1985 Amendments Act should this Court conclude that it violates some principle of federalism. New York contends that the 1985 Amendments Act is inseverable because it contains no severability clause and therefore the 1985 Act must be struck down, as a whole, if any provision is declared unconstitutional. The traditional standard for determining severability was recently affirmed by this Court:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its

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[31]131 Cong. Rec. S38423.

[32]Even if this Court were inclined to revisit *Garcia* and *Baker*, in-light of the State origins of the 1980 Act and its 1985 Amendments, based on principles of federalism, this case does not present a good vehicle to do so. In addition, considering the traditional regulation of nuclear matters by the national government and the pervasive nature of the problem of radioactive waste management and disposal, these Acts meet the substantive test of *National League of Cities*.

> power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (citations omitted). Courts give little weight to the presence or absence of a severability clause and tend to focus on other matters:

> We think the question where the presumption lies [without a severability clause] is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision.

Consumer Energy, Etc. v. F.E.R.C., 673 F.2d 425, 442 (D.C. Cir. 1982) (hereinafter, "*FERC*"). A recent decision from the Second Circuit went even further, adhering to this Court's plurality that there exists a presumption in favor of severability even without a severability clause:

> Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability.

Carlin Communications, Inc. v. F.C.C., 837 F.2d 546, 561 (2d Cir. 1988), (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)).

A review of recent cases demonstrates that the provisions of the 1985 Act do not make it "evident" that Congress would not have passed the Act without the "take title" provision. One of the most fertile fields of severability jurisprudence has been the legislative veto litigation following this Court's decision in *I.N.S. v. Chadha*, 462 U.S. 919 (1983). *Chadha* struck down the provision of the Immigration and Nationality Act allowing a one-house veto of the Attorney General's decision not to deport an otherwise deportable alien. This Court found that the remainder of the Act was "fully operative as law" and a "workable administrative mechanism," which supported the conclusion that the veto provision was severable. *Id.* at 934-935.

More recently, this Court followed its holding in *Chadha* by striking down a legislative veto provision in

Alaska Airlines, *supra*, related to the Employee Protection Plan of the Airline Deregulation Act of 1978. In considering whether Congress would have passed the Act without the veto, this Court thought the nature of the delegation governed by the veto was important: the broader or more controversial the delegation, the more likely Congress would want to retain control with a veto. *Alaska Airlines*, 480 U.S. at 685. Thus, striking down the legislative veto actually increased the delegation of authority. This Court's assumption in *Alaska Airlines* seemed to be that Congress was more willing to enact mild rather than radical legislation. This assumption also appears in *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977):

> When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent.

This line of reasoning supports a finding of severability in the present case. The 1985 Amendments Act is certainly less radical or controversial without the "take title" provision; if anything, the Act without the provision would be *more* likely to pass muster with the states because it would contain milder enforcement provisions than the actual 1985 Act.

A similar line of inquiry appears in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), which struck down part of Washington State's moral nuisance law as overbroad because it included "lust" as part of "prurient interests." The Court gave "lust" a limiting construction to exclude normal interest in sex. *Id.* at 504-505. The Court reasoned:

> It would be frivolous to suggest, and no one does, that the Washington Legislature, if it could not proscribe materials that appealed to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute. And it is quite evident that the remainder of the statute retains its effectiveness as a regulation of obscenity. In these circumstances, the issue of severability is no obstacle to partial invalida-

> tion, which is the course the Court of Appeals should have pursued.

Id. at 506-507. Like the over-broad use of "lust" in the Washington statute, if the "take title" provision of the 1985 Act is found to exceed constitutional boundaries, it is reasonable to assume that Congress would have passed the Act within constitutional limits. Since the 1985 Act is a workable administrative mechanism without the "take title" provision, the "take title" provision is therefore severable.[33]

In *United States v. Jackson*, 390 U.S. 570, 586 (1968), the capital punishment provision of the Federal Kidnapping Act was ruled unconstitutional but severable from the remainder of the Act because "its elimination in no way alter[ed] the reach of the statute and [left] completely unchanged its basic operation." To further drive home the distinction between substantive provisions and penalties, the court stated:

> [I]t is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties * * * were simply in aid of the main purpose of the statute. They may fall, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment.

Id. at 1219, n.28 (quoting *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 396 (1894).

As in *Jackson*, the "take title" and state liability provision is not essential to the 1985 Act's administration. Unsited states may have a lesser incentive to provide for their own low-level radioactive waste disposal in the absence of the "take title" provision, but the impact of this provision should not be over-emphasized. Even without the "take title" provision, the 1985 Act provides and has provided powerful incentives to participate in regional compacts and to

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[33]The legislative history of the 1985 Amendments Act also favors severability of the "take title" provision. "Because the provision comes in only 1996 * * *, it is intended that the provision be severable from the rest of the act, should it be found unconstitutional." 131 Cong. Rec. H38117 (1985) (statement of Rep. Markey).

site a low-level waste disposal facility. First, the penalty surcharges encourage waste generators to reduce the amount of waste they send to disposal sites. More importantly, the prospect of losing disposal rights in Washington, Nevada, and South Carolina after 1992 generates significant public health, economic, and political pressure to find new disposal solutions. The political fallout resulting from radiation hazards or idled utilities may not be appreciably different whether or not the state is holding title to the waste, and therefore the impetus to develop disposal sites is not destroyed even if the "take title" and state liability provision is stricken.

In any event, New York's challenge to the "take title" provision is not ripe. The take title penalty provision does not become operative until four years from now in 1996. Any analysis of the constitutional implications of that provision at this point is pure speculation.

POINT III

NEW YORK'S CHALLENGE TO THE 1980 AND 1985 CONSENSUS OF THE STATES IS A RETREAT FROM THE STATES' RESURGENT ROLE IN THE AMERICAN SYSTEM OF FEDERALISM.

New York's constitutional challenge to the 1980 Act and its 1985 Amendments is a betrayal of the states' consensus to be responsible for the management of low-level radioactive wastes on the state and local level for reasons of federalism. This action is an attempt to continue to reap the benefits of the compromise agreement by the sited states to continue to accept out-of-region wastes until 1993, without New York accepting the burdens of developing waste disposal capacity to which it had agreed in 1980 and reaffirmed in 1985. The state of New York licenses the use of radioactive materials for various beneficial uses as an agreement state under the Atomic Energy Act. New York obtains the benefits of the use of these nuclear materials, and pursuant to the

1985 Amendments Act continues to shift the burden of disposal onto the sited states.

This is the essential dilemma of radioactive waste management policy. The benefits of nuclear technologies are broadly distributed throughout society. The costs of dealing with the effluents of these technologies are highly concentrated. Radioactive waste disposal sites are ultimately established in some community's backyard. Waste disposal is indeed a land use problem, and land use problems are not something the national government is very effective in resolving. This is the essential reason the states took the responsibility for low-level radioactive waste management upon themselves under the 1980 Act and its 1985 Amendments.

New York would betray the compromise agreed to by the states in 1985 to equitably share that burden. This agreement was incorporated into the 1985 Amendments Act. If the 1980 and 1985 agreements are to be revisited, the proper fora for such a process is among the states' elected Governors in the National Governor's Association, the state legislatures in the National Conference of State Legislatures, and their elected representatives in Congress and not the federal courts.

> Negotiation and agreement with congressional, rather than judicial, supervision has long been the preferred method, provided by the Constitution, for resolution of interstate and sovereign disputes. When reviewing the complex provisions of the [1985 Amendments Act], courts should take particular note of this traditional preference.[34]

The 1985 Amendments Act is a fair and reasonable compromise developed by and for the states and enacted through the national political process. New York fails to show that they were denied an opportunity to participate in the national political process that brought about the legislation at issue. In fact the evidence is clear that New York actively sought and supported the agreement among the states. New York also fails to show that the Second Circuit Court of Appeals inconsistently applied the *Garcia* and *Baker* tests.

[34]Berkovitz, *Waste Wars: Did Congress Nuke State Sovereignty in the Low-Level Radioative Waste Policy Amendments Act of 1985?*, 11 Harvard Env. L. Rev. 437, 475-476 (1987).

The 1980 Act and its 1985 Amendments represent not commands of Congress to the states, but commitments made among sovereign states by and for the states. New York has obtained the benefits from the bargain it voluntarily entered into in 1980 and endorsed again in 1985 with all the other states. New York has retained access to the sited states' disposal facilities and it has received surcharge rebates to pay for the construction of its own facility. New York also retains the right to enter into a compact or arrangement with other states to assist in the management of its waste. The sovereign states of Washington, Nevada, and South Carolina are only ten months from fulfilling their promises to continue to be national disposal sites until a time certain. These States have borne the burden of being national disposal sites long enough.[35] It is time for New York to be held to its twelve year old voluntary commitment to manage its own low-level radioactive waste.

The 1980 Act and its 1985 Amendments are paragons of federalism. The Tenth Amendment does not prohibit states from agreeing among themselves to solve a national waste disposal problem. The 50 sovereign United States participated in the state and national political process to forge a consensus to solve a serious problem that affects all the states—the safe disposal of low-level radioactive waste.

CONCLUSION

The judgment of the Second Circuit should be affirmed, and the 1980 Act and its 1985 Amendments should be de-

[35]Nevada's disposal site has been open for 30 years. The Hanford facility in Washington has been open for 27 years. South Carolina has taken low-level radioactive waste for disposal for 21 years.

clared constitutional in their entirety. However, if any provision is found to be constitutionally defective it should be severed from the balance of the Acts.

DATED this 3rd day of March 1992.

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Nos. 91-543; 91-558; and 91-563

In The

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER THE COUNTY OF ALLEGANY

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ARGUMENT

I.

THE ACT IS AN UNCONSTITUTIONAL MANDATE TO THE STATES.

A. *The Act's direction that each state "shall be responsible" is a mandate and not a mere policy statement.*

The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021b *et seq.* (the "Act"), mandates that each state is responsible for the disposal of low-level radioactive waste generated in the state. While the states have three options as to how to carry out this federally imposed obligation, the states *must* exercise the sovereign powers reserved to them pursuant to the Tenth Amendment. Such a direct mandate to the states by the national government to carry out a federal policy is unprecedented, beyond the enumerated powers of Congress and contrary to the status of the states as established by, *inter alia*, the Tenth Amendment and the Guarantee Clause. Allegany County Br. 9-19.

Respondents, Intervenors and various supporting *Amici* argue that the Act's language that each state "shall be responsible" for disposal of low-level radioactive waste is a mere statement of policy. United States of America, *et al.* (hereinafter "Respondents") Br. 10-15; State of Washington *et al.* (hereinafter "Intervenors") Br.7-8; Rocky Mountain Low-Level Radioactive Waste Compact *et al.* (hereinafter "Compacts") Br. 18-21; AFL-CIO Br. 14-16; American College of Nuclear Physicians *et al.* (hereinafter "Generators") Br. 6-9; U.S. Ecology, Inc. Br. 17-18. Respondents, Intervenors and their *Amici* argue that the Act is within the constitutional power of Congress to provide "incentives" to the states to carry out congressional policy. Congress is portrayed as merely acting as an "umpire" or "referee" to help the states to carry out

a prior agreement. *See* Respondents Br. 28; Intervenors Br. 24, 25; Compacts Br. 1,9.

Respondents, Intervenors and their *Amici* are wrong. The Act, read as a whole, is a directive by the national government that each state provide for the disposal of low-level radioactive waste. The states can either (i) develop alone, or in agreement with other states, a disposal facility, (ii) take title and possession to the waste, or (iii) pay all damages resulting from a failure to take title or possession of the waste. The states, however, are always "responsible."

When Congress wished merely to make a statement of policy in the Low-Level Radioactive Waste Policy Act of 1980, P.L. 96-573, 94 Stat. 3348 ("1980 Act") it did so explicitly by declaring that it was the "policy of the Federal Government that ... each State is responsible for providing for the availability of capacity either within or without the State for the disposal of low-level radioactive waste generated within its borders". Yet, the plain language of the Act, passed in 1985, contains an express mandate to the states: "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste". 42 U.S.C. §2021c(a)(1). Congressional supporters of the Act acknowledged its mandatory nature. *See* 131 Cong. Rec. S. 18,104; S. 18,113 (daily ed. December 19, 1985) (statements by Senators Hart and Johnston).

B. *Congressional power cannot be expanded by "consent".*

Respondents, Intervenors and their *Amici* argue that even if the Act is viewed as a mandate to the states, the legislative power of Congress can be expanded based upon consent of the states. *See* Respondents Br. 33; 37-38; Intervenors Br. 17-19; Compacts Br. 23-27.

The Constitution grants Congress only enumerated legislative powers. Laurence H. Tribe, *American Constitutional Law* §5-2 at 298 (2d ed. 1988); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 945 (1983). The Framers considered and rejected grants of broader legislative powers. The Framers twice considered giving Congress the power "to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." Laurence H. Tribe, *American Constitutional Law*, §5-2 at 298 n.1 (2d ed. 1988) (quoting 1 M. Farrand, *Records of the Federal Convention of 1787*, 53 [1911]). Instead, the Framers only granted Congress the legislative powers enumerated in Article I, §8. Therefore, an act of Congress is invalid unless authorized by the Constitution even if the states have been ineffective in dealing with the problem addressed by the act. *See Id.; Kansas v. Colorado*, 206 U.S. 46, 89-92 (1907).

The alleged "consent" of the states does not operate to expand Congressional power beyond the enumeration of the Constitution.[1] In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983), this Court held "[t]he hydraulic pressure inherent in each of the separate Branches to exceed the outer lim-

[1] Respondents, Intervenors and their *Amici* argue that all of the states consented to the Act by the National Governors' Association's ("NGA") promotion of a program giving the states the *primary* responsibility for siting low-level radioactive waste facilities. Respondents Br. 8-9;28; Intervenors Br. 6-7; Compacts Br. 7-8; AFL-CIO Br. 13-14; U.S. Ecology, Inc. Br. 4-6. However, the promotion by a lobbying group, even the NGA, of a program does not constitute consent by the states as sovereigns. The states never entered into a written agreement, approved by the various states' legislatures, which was then submitted as a compact for approval to the Congress pursuant to Article I, §10, cl. 3. As this Court has noted, a compact between states, although approved by Congress, remains a legal document that must be construed and applied in accordance with its terms. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Since the states as sovereign entities never entered into any written contract or "legal document", they cannot be bound. Moreover, the "take title" provision was not part of the program submitted by the NGA.

its of its power, even to accomplish desirable objectives, must be resisted". *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 565 (Powell, J., dissenting) (the "hydraulic pressure" to exceed the constitutional limits of power may operate "when Congress seeks to invoke its powers under the Commerce Clause . . ."). In *Chadha*, this Court struck down the enactment of a one-house legislative veto with respect to decisions to allow certain aliens to remain in the United States. This provision was declared unconstitutional even though both Houses of Congress and the President consented by enacting and signing the law. As this Court noted:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President [citation omitted]. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 959 (1983).

Since "political" consent by other affected branches of the national government is insufficient to expand the power of another branch, the alleged consent of the states to the Act is insufficient to expand the powers of Congress beyond those enumerated in the Constitution. *See* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 19 (1988) ("[i]n matters of state sovereignty, as

in *Chadha*, political waiver of a constitutional limit on governmental power should not bar vigorous judicial review"). If the states and/or Congress wish to expand the power of Congress, they can do so by amending the Constitution in accordance with Article V. There is no basis for the claim that an expansion of Congressional power can occur by simple "consent."[2]

The Commerce Clause does not authorize federal mandates to the states. The Framers rejected the notion of giving Congress power to mandate the states to exercise their sovereign powers to carry out a federal policy. This Court has never held that Congress has such power. The Act is beyond the enumerated powers of Congress and, therefore, unconstitutional.

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[2] Moreover, Respondents', Intervenors' and their *Amici's* position that Congressional power can be expanded by informal agreements of the states would involve the federal courts in endless adjudication over the issue of the quality and scope of such "consent". Respondents, Intervenors and some of their *Amici* base their consent argument on the unanimous vote of Congress and the alleged consent of the states to the Act. Respondents Br. 8-10; 37-38; Intervenors Br. at 17-19; Compacts Br. 23-27. This analysis raises a number of troubling problems.

Can Congressional power only be expanded by "unanimous agreement"? What if one state or Congressman had opposed the Act or if the Act had passed by a mere one vote margin in both Houses of Congress? It follows from Respondents', Intervenors' and their *Amici's* argument that the Act would somehow be less "constitutional" if these events had occurred. This approach would have the federal courts making determinations as to whether or not the quality and scope of the "consent" given by the states and the vote margin in Congress were sufficient to justify the intrusive legislation in question.

It is not the proper role of the federal courts to conduct such inquiries. The proper inquiry for the federal courts should be limited to whether or not the legislation in question was within the enumerated powers of Congress and whether such power was properly exercised. *See* Laurence H. Tribe, *American Constitutional Law*, §5-2 at 298-300 (2d ed. 1988).

II.

THE ACT IS DESTRUCTIVE OF THE CONSTITUTIONAL STRUCTURE OF FEDERALISM.

A. *The Act impermissibly limits state sovereignty.*

Respondents, Intervenors and their *Amici* make the curious argument that the Act is protective of state sovereignty. Much is made of the "numerous" options open to the states as to how to comply with the Act's mandate. Respondents Br. 17, 34-38; Intervenors Br. 12-15; Compacts Br. 14; Generators Br. 21-25; AFL-CIO Br. 23-25. Respondents, Intervenors and their *Amici* argue that there is no impingement on state sovereignty because of these numerous options.[3]

The Act, however, deprives the states of many options which should be available to a sovereign state with reserved powers. For example, the states are deprived of the option of devoting their monetary, legislative, executive and judicial resources to issues chosen by the state. The Act infringes on the states' sovereignty by requiring that states devote resources according to federal priorities as opposed to state priorities. *See* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 61-62 (1988); *Maryland v. Environmental Protection Agency*, 530 F.2d 215, 225 (4th Cir. 1975),

[3] Respondents, Intervenors and their *Amici* cite *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) (hereinafter *"FERC"*) for the proposition that this Court should balance the alleged minimal intrusion of the Act against the important federal interests served. The so-called "balancing" approach of *FERC* is inapplicable to the Act. This Court's ruling in *FERC* was based in large part on the fact that the act in question gave the states the *option* to regulate or not to regulate public utilities. Only if the states chose to regulate such utilities did they have to comply with the federal requirements. *FERC*, 456 U.S. at 769 n. 32. The Act, in contrast, leaves the states with no such option. The Act is therefore not merely intrusive on, but it is destructive of, state sovereignty. The federal interest asserted cannot "outbalance" the destructive nature of the Act.

vacated and remanded for consideration of mootness, 431 U.S. 99 (1977).

Another option the states cannot exercise is requiring the generators of low-level radioactive waste to be responsible for disposal of such waste. As Senator Hart stated in support of the "take title" provision: "[w]e were concerned . . . that a state may choose to 'manage' its waste by telling the waste generators that they have to develop a means of storage for their waste." 131 Cong. Rec. S. 18,104 (daily ed. December 19, 1985). Congress deprived the states of the option to exercise their police powers to require those directly responsible for creating a public health and environmental nuisance to remediate such nuisance.

Finally, Congress, by setting a specific schedule for compliance with its mandate, has severely limited the state options in dealing with the issue of low-level radioactive waste. A state might reasonably decide to pursue a program of promoting and developing new and innovative technologies which would reduce the production of low-level radioactive waste and/or safely provide for its disposal. Such a "technology forcing" program might take longer to develop than January 1, 1996. Short-term interim storage at the site of the generation of low-level radioactive waste would be a reasonable option while these new technologies were being developed. The Act, however, constitutes a decision by Congress that the states cannot pursue such an option.

B. *Less intrusive and constitutionally permissible means are available to Congress.*

Respondents, Intervenors and their *Amici* also assert that the Act is less intrusive on state sovereignty than the only allegedly available alternative — a siting program conducted by the national government. *See* Respondents Br. 37-38; Intervenors Br. 10-11; AFL-CIO Br. 26; Compact Br. 15-16.

This analysis is wrong. There are a number of far less intrusive means which have already passed constitutional muster which Congress could still choose to promote the development by the states of low-level radioactive waste disposal facilities. For example, Congress could pass legislation which would provide that either each state develop or contract for disposal capacity or else the national government will develop such capacity. A similar approach has been followed with respect to the issues of clean air and regulation of public utilities. *See, e.g., Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982). Congress could include in this legislation a measure giving states which develop such capacity the power to exclude out-of-state waste.

Congress could also enact a program of conditional grants to states which develop their own programs to dispose of low-level radioactive waste. *See, e.g., Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989) *cert. denied*, 493 U.S. 1070 (1990) (conditional grant of federal highway funds if 55-mile-per-hour speed limit enforced). Once again, Congress could include in this legislation a provision allowing states which develop their own disposal capacity the option of excluding out-of-state waste.

Either of these options would advance the interest of the national government without rendering the states mere departments or agents with respect to low-level radioactive waste. The states would retain the right to decide whether or not to exercise their sovereign power. Thereby the constitutional structure of dual sovereignty would be respected while the interest of the national government would still be advanced.

The Act, in contrast, impermissibly infringes on the states' sovereignty by unnecessarily mandating the exercise of the states'

sovereign powers to carry out a federal policy. The Act should therefore be declared unconstitutional.

III.

THE ACT VIOLATES THE GUARANTEE OF "A REPUBLICAN FORM OF GOVERNMENT".

The mandatory nature of the Act and its sanctions undermine the separate character of the sovereign states and the right of the people of the states to determine the course of their own government with respect to low-level radioactive waste. The Act, therefore, violates the Guarantee Clause of the Constitution, Article IV, Section 4.

While contesting the justiciability of the Guarantee Clause claim,[4] the Respondents, Intervenors and their *Amici* do not contest the fact that the Act interferes with the relationship of the

[4] The issue of the justiciability of the Guarantee Clause claim is discussed in Allegany County's Brief at 21-23.

Respondents also assert that the State of New York is the only party which can assert a claim based on the Guarantee Clause and that the State of New York has not asserted such a claim. The State of New York has, in fact, specifically relied on the Guarantee Clause in its arguments. *See* New York Br. xi; 23-24. Moreover, the State of New York invited Allegany County as one of its political subdivisions to participate in this action. *See* J.A. at 39a. Therefore, this Court's decision in *New Jersey v. New York*, 345 U.S. 369 (1953) is distinguishable.

Allegany County also has independent standing to maintain this action. To have standing, a party must show that it has sustained, or is in immediate danger of sustaining, some direct injury, and not merely that it suffers in some indefinite way in common with people generally. *See Sierra Club v. Morton*, 405 U.S. 727 (1971). Allegany County has expended human and financial resources against its will because of the Congressional mandate contained in the Act. *See* Allegany County Br. 6 n.5.

Allegany County's status as a political subdivision of New York does not prevent the county from raising Tenth Amendment and Guarantee Clause arguments with respect to an unconstitutional statute that directly harms the county. *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *National League of Cities v. Usery*, 426 U.S. 833 (1976).

people of the states and the states governments. Intervenors and and some of their *Amici* admit that the essence of the Act is to compel the states to develop low-level radioactive waste disposal facilities despite "political" opposition. Intervenors Br. 9; Compacts Br. 3; Generators Br. 3; U.S. Ecology, Inc. Br. 12-13. The people of the states who oppose the siting of such low-level radioactive waste facilities are described as suffering from the "not in my backyard" or "NIMBY" syndrome.[5] The purpose of the Act is to force states to develop low-level radioactive waste facilities despite the contrary wishes of many of the people of the states. As noted by *amicus curiae* U.S. Ecology, Inc.:

> Public opposition and political reactions to such controversial projects are too great to overcome without the federal mandate and protection afforded by the 1985 Amendments.

U.S. Ecology, Inc. Br. 13-14.

If the states were forced by the national government to exercise their sovereign powers contrary to the wishes of the people of the states, then the states would no longer have a form of government which is republican in nature. Instead, the form of government of the states would be reduced to one which is "administrative" in nature; no longer answerable to the people of the states but to the legislature of the national government. Such a result is contrary to the guarantee of a republican form of government to the states.

---

[5] Respondents, Intervenors and their *Amici* are inconsistent in their discussions of the hazards of large scale low-level radioactive waste disposal facilities. They dismiss in an off-hand manner the concerns of the people of the states who oppose further development of large scale low-level radioactive waste disposal facilities. Yet, the Respondents, Intervenors and one of their *Amici* point to the safety and health concerns associated with the three existing facilities in South Carolina, Nevada and Washington in support of their arguments. Respondents Br. 3; Intervenors Br. 3-4; AFL-CIO Br. 6-7.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed and the Low-Level Radioactive Waste Policy Amendments Act of 1985 should be declared unconstitutional.

Dated: March 20, 1992

Respectfully submitted,

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Nos. 91-543; 91-558; 91-563

IN THE

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Reply Brief for Petitioner State of New York

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OCTOBER TERM, 1991.

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

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THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

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Reply Brief for Petitioner State of New York

POINT I

Respondents' arguments notwithstanding, the 1985 Act imposes an unprecedented and impermissible affirmative burden upon the States and seriously undermines the principles of the federal system.

The central issue in this case is whether the Congress, pursuant to its powers under the Commerce Clause, may impose affirmative obligations solely upon States as States to engage in an activity essentially in perpetuity. The mandate of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Act), as we have shown (NY Brief, pp 21-31), accords the individual States no option *not* to participate, just options on *how* to participate in the federal regulatory scheme. To our knowledge, the Act taken as a whole is an affirmative command upon the States pursuant to the Commerce Clause unlike any other previously examined by this Court. Imposed solely on the States,[1] the Act's mandate compels the States to enter the field of low-level radioactive waste disposal, without opportunity to decline to enter or to withdraw from the field,

[1]Remarking on such discriminatory treatment of States in the context of taxation, this Court noted in *New York v United States*, 326 U.S. 572, 575-576 (1946) (Frankfurter, J.):

> Enactments levying taxes made in pursuance of the Constitution are, as other laws are, "the supreme Law of the Land." Art. VI, Constitution of the United States. * * * But the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government. [Citation omitted]. Thus, for Congress to tax State activities while leaving untaxed the same activities pursued by private persons would do violence to the presuppositions derived from the fact that we are a Nation composed of States.

See also, 326 U.S. at 586 (Stone, C.J., concurring) ("Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government").

and to take actions with implications lasting more than five centuries. Insofar as the Congress, through the Act, enlists unwilling States into its service in this fashion with neither recourse nor reward, it seriously undermines the federalist system.

In their defense of the constitutionality of the Act, respondents and *amici*[2] have sought to direct attention from its most salient attributes and to recharacterize its fundamental effects. They have argued in substance that the Act was well-intentioned; that certain discrete segments of the Act are constitutionally sound; that other federal actions have imposed significant affirmative duties upon the States; that the Act has yielded some beneficial results to the States, including New York, between 1986 and the present. Typical is the argument offered by federal respondents (US Brief, p 37; emphasis in original):

> To be sure, the significant commitment of state resources required to comply with this [take-title] option could raise serious concerns if Congress *required* the States to pursue the course. But the existence of other less burdensome options in this comprehensive program significantly mitigates the burden. Moreover, when the modest level of this intrusion is considered in light of the admittedly grave need for a national resolution to this problem, and the special

[2]Respondents and *amici*, and their respective briefs to this Court, will be referenced as follows: United States of America, *et al.*: federal respondents, US Brief; States of Washington, Nevada and South Carolina: state respondents, States Brief; American College of Nuclear Physicians, *et al.*: *amici* generators, Generators Brief; Rocky Mountain Low-Level Radioactive Waste Compact, *et al.*: *amici* sited compacts, Compacts Brief; U.S. Ecology, Inc.: *amicus* U.S. Ecology, Ecology Brief. The main brief filed by New York State in this matter will be referenced as "NY Brief."

circumstances that led Congress to choose the course that it did, we believe the take-title provision withstands constitutional scrutiny.

These assertions miss the mark and are thus largely irrelevant to the question facing this Court. What is crucial is not the Congress's good intentions but whether the means chosen to deal with the problem of low-level waste disposal are constitutionally permissible in the federal system. We have never questioned the Congressional authority to regulate the disposal of low-level radioactive waste or to attempt to recruit States to do such regulation in its stead, if they so choose. But the fact that the Congress could properly act by other means or that certain portions of the Act could be valid as part of a different statutory scheme, or if viewed in isolation, as the federal government argues, cannot justify the uniquely compulsory ultimate burden imposed by the Act. No past imposition of affirmative duties by the Congress upon the States through the Commerce Clause is analogous to the present Act. None has required a State to engage in an activity involuntarily and without any opportunity for withdrawal.

No arguments raised by respondents or *amici* justify their claim that the Congress, pursuant to its powers under the Commerce Clause, may impose upon the States a burden comparable to the mandate that they must provide for the disposal of low-level radioactive waste and even take title to such waste. Such commandeering of state sovereign power violates the Tenth Amendment and the fundamental principles of federalism. Consequently, the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act") should be stricken.

POINT II

Arguments raised by respondents and *amici* fail to justify the unique and impermissible burdens of the 1985 Act.

The arguments raised by respondents and *amici* in defense of the 1985 Act fail to justify its unique and intrusive mandate upon the States. While these arguments have in large part been addressed in our main brief, we will take the opportunity here presented to briefly recapitulate and expand that earlier discussion.

A. The 1985 Act is not an exercise of the Congress' spending power.

The federal respondents' argument that the incentive payment scheme established by 42 U.S.C. § 2021e(d)(2)(B) is a valid exercise of congressional spending power (US Brief, pp 22-23) is neither relevant nor legally accurate.

Significantly, the federal respondents have limited this argument to provisions of the 1985 Act which New York has not attacked as unconstitutional if viewed separately. Although we do not agree with respondents' suggestion that these provisions assume a "commonplace form" (US Brief, p 21), New York has not argued at any time during this litigation that such provisions, standing alone, would impose unconditional and unconstitutional affirmative duties upon the States. The constitutionality of the milestone provisions is simply beside the point.[3]

Moreover, the spending power argument is totally flawed even when applied only to the milestone provisions as in this case. Contrary to respondents' assertion (US Brief, p 23), the

[3]Arguments offered by *amici* sited compacts defending these provisions on other grounds (Compacts Brief, pp 18-21) are likewise irrelevant.

1985 Act in no manner calls for the spending of federal funds. Indeed, the Congress could hardly have been more explicit in its characterization of these surcharge funds as a trust held for the States and waste generators, rather than as an exercise of federal spending.[4] The fund is not administered through congressional taxation and appropriation.[5] The amount of funds collected into the fund, if any, is determined only in broad scope by Congress; each sited State may decline to impose surcharges or increased surcharges under the 1985 Act. 42 U.S.C. § 2021e(d)(1). Transfers from this surcharge fund are mandated under the Act upon the performance of certain conditions and require no congressional appropriations. Moreover, escrow funds are available to States only if and to the extent that waste generators within their borders have used the Hanford, Beatty, or Barnwell sites.

Finally, this is not a federal spending scheme in which States which decline to participate face only the loss of federal funds. Here, even if a State were to decline to accept such funding, or were ineligible for its receipt for one reason or another, it is nonetheless required to provide some form of disposal program by January 1, 1996 or suffer the conse-

[4]Pursuant to 42 U.S.C. § 2021e(d)(2)(A) (emphasis added),

> The Secretary [of Energy] shall deposit all funds received in a special escrow account. *The funds so deposited shall not be the property of the United States.* The Secretary shall act as trustee for such funds and shall invest them in interest-bearing United States Government Securities with the highest available yield.

[5]As this Court noted in *United States v Butler*, 297 US 1, 65 (1936), the congressional spending power is closely linked with the power "to lay and collect Taxes, Duties, Imports and Excises" and the power of appropriations:

> The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. I, § 9, cl. 7.) * * The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States."

quences of the take title provision. In this respect, federal respondents' claim that the States have at their disposal "the simple expedient of not yielding to * * * federal coercion" (US Brief, p 23 [citations omitted]), is greatly misleading.[6]

B. The 1985 Act is not a compact among the States.

A second misguided argument, raised by both the state respondents (States Brief, pp 23-25) and the sited compact *amici* (Sited Compacts Brief, pp 11-18), makes the claim that the 1985 Act, rather than imposing a federal regulatory scheme upon the States, represented a nationwide resolution of the low-level waste disposal problem by all the States acting in concert. According to the state respondents, this form of interstate cooperation, involving a variety of national lobbying organizations working in cooperation with the federal Congress, is the epitome of cooperative federalism and requires a restrained role of review for the federal courts.[7] According to the sited compacts, the 1985 Act represents a scheme of federalism in which "Congress' *sole* role * * * [is] that of *umpire* or *referee* * * *" of state-created agreements (Sited Compacts Brief, p 16; emphasis in original), rather than that of architect of federal policy.

While the records of the Constitutional Convention of 1789 and its aftermath reveal a variety of perspectives on the benefits of the federalist system, an unchallenged attribute of that

[6]Federal respondents' claim in this regard is noteworthy in light of their subsequent assertion that the effects of the take title provision are "substantially mitigate[d]" by the "existence of other less burdensome options in this comprehensive program" (US Brief, p 37).

[7]As the state respondents would have it (States Brief, p 24):

> If the 1980 and 1985 agreements are to be revisited, the proper fora for such a process is among the states' elected Governors in the National Governors Association, the state legislatures in the National Conference of State Legislatures, and their elected representatives in Congress and not the federal courts.

system was the republican form of government at both the federal and state level. This appreciation of the republican form of government was clearly stated in the Constitution's Guarantee Clause;[8] it continues to enjoy undiminished respect among the guardians of our political order.[9]

These principles of representative government are entirely incompatible with the suggestion, urged upon this Court by the state respondents and sited compacts, that the 1985 Act was an agreement among state governments, orchestrated by the National Governors' Association and other national groups. The NGA and similar organizations are not super-legislatures; they have no legislative or executive authority in the federal scheme. They are instead voluntary associations of state officials (or their surrogates), engaged in research and policy analysis. The milieu of these organizations is that of the lobbyist; their tools are persuasion rather than edict. The policy recommendations and draft legislation put forth by the

[8]We note in passing the erroneous claim by the federal respondents (US Brief, pp 39-40) that New York State has "declined to press the [Guarantee Clause] claim on behalf of its citizens". On the contrary, New York contends that this Clause is an element of the federalist structure of the Constitution, upon which its claim in this matter is based. *See, South Carolina v Baker,* 485 US 505, 531 (O'Connor, J., dissenting) (state autonomy in federal system is arguably protected from substantial federal intrusion by virtue of the Guarantee Clause). New York supports the Guarantee Clause arguments made by the County of Allegany in this matter.

[9]*See, e.g., Gregory v Ashcroft,* ____ U.S. ____, 111 S. Ct. 2395, 2400, 115 L Ed 2d 410, 422-423 (1991), citing the Federalist No. 28 (Hamilton):

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

NGA and other bodies do not represent legislative choices of States, nor are they binding upon States or their citizens.

Respondents' nationwide compact theory is dubious even for those States which might be considered to have acted in concert in this matter: those which proposed to join compacts prior to the passage of the 1985 Act. As the legislative history of the 1985 Act indicates, the Congress acceded to the urging of the sited States—not the NGA or other groups—to amend the proposed compacts by adding the take title provision, thereby decisively altering all prior state compacts. While many States chose to remain in compacts in spite of this amendment, the claim that these compacts represent a nationwide agreement of States, merely affirmed by the Congress, is incorrect.[10]

C. At no time did New York State acquiesce in the validity of the 1985 Act.

Related to respondents' "nationwide state agreement" argument is the claim that New York, even if not part of such an agreement among the States dealing with low-level waste, subsequently enjoyed the benefits of this solution for several years, and should not now be permitted to withdraw from the scheme. This argument reflects several misperceptions.

New York's compliance with the Act from 1986 through 1991[11] represented a committed effort to obey federal law, rather than an acceptance of the scheme's constitutionality.

[10] Similarly, state respondents' claim that "[t]he take title provision was * * * accepted by the NGA and the states" (States Brief, p 18) is entirely unsupported and erroneous.

[11]A plan for interim management of New York generated waste was submitted in accordance with the January 1, 1990 milestone. Despite its best efforts, New York was unable to submit a completed application for a license to operate a disposal facility by January 1, 1992, and thus did not meet that milestone. 42 U.S.C. § 202le(e)(1)(D).

Such an effort at compliance cannot serve as a basis for surrendering its own sovereign powers and obligations. As this Court noted in *Guaranty Trust Co. v United States*, 304 U.S. 126, 132-133 (1938), laches arguments do not bind the States:

> The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. * * * Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. [Citations omitted.] So complete has been its acceptance that the implied immunity of the domestic "sovereign," state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included * * * *.

See also, United States v Kirkpatrick, 22 U.S. (9 Wheat.) 720, 735 (1824) (even "the utmost vigilance" would not save public from serious losses if doctrine of laches applied to government operations).[12]

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[12]Moreover, we note that New York unsuccessfully made many efforts to enter into agreements for waste disposal with another State or compact during this period. Indeed, each of the respondent sited States has declined to enter into such an agreement with New York. So too has every State or compact currently planning to operate a disposal facility.

Respondents have also greatly overstated the so-called benefits accepted by New York under the 1985 Act. Under the Act's provisions, continued access to disposal sites since January 1, 1987 has been tightly linked with New York's compliance with milestone requirements for site development. 42 U.S.C. §§ 202le(e)(2)(A)(ii); (B)(ii); (C). The sited States during this period were able to limit and control the amount of waste shipped to their sites from New York and other states, while at the same time receiving significant surcharges from generators of waste, including New York generators. New York's acceptance of surcharge rebates offered little value to the State, inasmuch as state law required that such payments be employed to offset disposal site development costs. Public Authorities Law § 1854-d(2)(a)(i).

Nor did New York at any time act in acquiescence to the take-title provision currently challenged. Although the take-title provision has had a great impact upon the State for several years, and has compelled the State to commence a disposal siting process, such compelled compliance with the milestone requirements of the Act does not reflect an endorsement of or acquiescence in that provision.

D. New York State's challenge to the 1985 Act is ripe for decision by this Court.

Federal respondents' argument that the constitutional challenge to the 1985 Act is not currently ripe for decision by this Court (US Brief, pp 256-26) is also wrong. In light of the multi-year process of development of a disposal site and the dire consequences of the take title provision, the take title threat was and continues to be strongly felt years before the provision might actually go into effect. New York's legislative decision to develop a disposal site—including the implementation of a controversial and expensive site selection process—was driven by this mandate, together with the Act's other

requirements.[13] So too were the timetable of site development, the selection of disposal technologies and site, and the failure to experiment with or implement alternative courses of state action—including a decision to decline to enter the field of waste disposal, or to postpone entering the field until more economical technologies were available.

The problems immediately facing the State in light of the take title provision are hardly hypothetical. While respondents and several *amici* have argued that the State need only contract with another State or compact to avoid the burdens of the provision, there is an obvious flaw in this view: even such a "minimal" intrusion compels the State to enter into an agreement with another State or compact, to an extent far from trivial. The power of choice that is fundamental to state sovereignty implies not merely the choice of means of compliance with the federal scheme, but the choice of whether or not to participate in that scheme at all. Moreover, contrary to respondents' suggestion, a State cannot enter into such an agreement without the cooperation of another State or compact. New York's repeated efforts to secure such cooperation have been unsuccessful. Respondents considerably underestimate the difficulty involved in arranging such an agreement at this time, especially as a consequence of the take title provision. Currently, at least four States or compacts anticipate disposal site completion only after January 1, 1996.[14] Moreover, timely completion is hardly assured even where site development is currently further advanced: as the history of site development subsequent to 1985 has shown, technical and other problems can quickly arise in the course of creating a disposal facility, rendering certain proposed state or compact

[13]See, Affidavit of Assemblyman Clarence Rappleyea (JA80a-81a).

[14]*See*, Office of Environmental Restoration and Waste Management, U.S. Dep't of Energy, *Report to Congress in Response to Public Law 99-240: 1990 Annual Report on Low-Level Radioactive Waste Management Progress* (1991) ("DOE Report"), p viii. This Report has been lodged with the Court by federal respondents.

sites unavailable.[15] In light of these current difficulties, respondents' suggestion that this constitutional issue should be addressed at a later date is meritless.

E. Elimination of the constitutionally defective 1985 Act will not result in a national crisis over radioactive waste disposal.

Somewhat at odds with respondents' ripeness argument is the claim by several *amici* that great urgency surrounds the problem of low-level waste disposal and militates against rejection of the 1985 Act by this Court (US Ecology Brief, pp 13-17; Generators' Brief, p 28). This argument too lacks merit.

While the disposal of low-level radioactive waste is a problem of significant national concern, there is no reasonable basis to conclude that rejection of the 1985 Act by this Court will have severe immediate repercussions. Following such a ruling, Congress will have ample impetus and opportunity to develop a constitutionally acceptable solution to the waste disposal problem. Indeed, in some ways that problem today is far less critical than at the time Congress drafted the 1985 Act. According to the latest United States Department of Energy report on the subject, the volume of annual waste disposal at the Barnwell, Hanford, and Beatty sites dropped from 2.68 million cubic feet to 1.14 million cubic feet between 1985 and 1990. Report, A-6. During this same period, disposal at these sites was significantly below the volume ceiling established in the Act. Report, A-6; 42 U.S.C. § 2021e(b). Moreover, States and compact regions are currently projecting the completion of at least twelve disposal sites by 1997, including one in 1992, two in 1993, four in 1995, and four in 1996. Report, p viii. While some of these facilities might well be reconsidered if the 1985 Act were stricken, there are no grounds to anticipate a "chaotic situation worse than that which prompted

[15]*See, e.g.*, DOE Report, pp xii-xiii, 13-18.

initial passage of the 1980 Act" (US Ecology Brief, p 13). Moreover, should the need arise for a temporary storage expedient, on-site storage practices may safely be entertained, as they must be even under current DOE estimates. Generators in New York and in many other States and compacts have been on notice for some time now of their need to be prepared for temporary storage by the beginning of next year.[16]

Given the range of permissible incentives and directives available to the Congress for treatment of the low-level waste disposal problem, as well as the current availability of long term disposal or short-term storage options for generators, it cannot be credibly argued that a health and safety crisis exists sufficient to mitigate the constitutional infirmities of the 1985 Act.

F. Respondents have failed to show any prior impositions by the Congress or this Court comparable to the mandate challenged here.

We address briefly, and lastly, federal respondents' argument that the Congress may impose affirmative obligations upon States comparable to the take title provision pursuant to its powers under the Commerce Clause (US Brief, pp 29-32).

Respondents continue to err in likening the power of this Court to impose obligations upon States, in the course of resolving cases pursuant to its Art. III, § 2 jurisdiction, with the Congress's power to enact general legislative measures in the regulation of interstate commerce. Respondents would

[16]*See, e.g.*, JA58a (Monaco Affidavit); DOE Report, pp 70-71 ("Beginning in 1993, as much as 80 percent of the volume of the Nation's low-level radioactive waste could be required to be temporarily stored * * *"). *See also*, New York State Energy Research and Development Authority, New York State Low-Level Radioactive Waste Status Report for 1990 (June, 1991), p 11 (describing percentage of in-state generators storing waste). This Report has been lodged with the Court by federal respondents.

have this Court equate its decrees to States resolving interstate water disputes with the obligation under the present Act to engage involuntarily in an activity mandated by Congress (US Brief, p 31). Respondents here err in their claim that a general, common-law duty of States to conserve and augment an interstate stream, or refrain from polluting a neighboring State, is qualitatively comparable to the novel requirement that States regulate or assume responsibility for all low-level radioactive waste within their boundaries (US Brief, p 31). They err more fundamentally in their claim that these cases impose affirmative judicial commands upon the State.

For example, in *Wyoming v Colorado*, 259 U.S. 419 (1922), this Court, exercising original jurisdiction under Art. III, § 2, employed an equitable apportionment analysis under federal common law to resolve a conflict between two States over interstate water supplies. Under this analysis, the Court found that apportionment of waters of the Laramie River should not be based on the river's lowest historical flow, as urged by the downstream State (Wyoming), but rather should be based on the flow that would result from Wyoming's reasonable effort to conserve and equalize the stream. 259 U.S. at 456, 484. The Court did not issue an affirmative command to Wyoming to implement conservation measures; it merely held that an "affirmative duty" of reasonable action should be a factor in apportionment. This principle was repeated in *Colorado v New Mexico*, 459 U.S. 176, 185 (1983) (downstream user may be presumed to take reasonable steps to conserve stream in equitable apportionment assessment).

In *Wyoming v Colorado*, 309 U.S. 572, 580 (1940), this Court stated the unexceptional proposition that a State, upon diverting more upstream water than permitted under a previously issued Supreme Court decree, could be adjudged in contempt just as any other litigant. No command that the State

commence a new program or enter a new field was involved in this discussion. Moreover, contrary to federal respondents' claim (US Brief, p 32 n 44), Congress did not impose an affirmative obligation on state officials under the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618. The express terms of that Act required subsequent State approval to make it binding upon the States involved.[17]

Even *Missouri v Illinois*, 200 U.S. 496 (1906), and *Illinois v City of Milwaukee*, 406 U.S. 91 (1972), which generally declare this Court's jurisdiction to apply common law nuisance and other principles in resolving a particular dispute between two States over the pollution of an interstate water supply, provide no basis for analogy to the case at bar. Finally federal respondents miss the mark with their claim (US Brief, p 31 n 42) that this Court in *Washington v Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), upheld a judicial command to prepare a set of rules implementing the Court's interpretation of the rights of the parties to the disputes. This Court went on in that case to express clear doubt as to the validity of a court order to *implement* such regulations, noting that the district court itself could assume that duty if necessary (443 U.S. at 695-96):

> Whether Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful. But the District Court may prescind that problem by assuming direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued. It is therefore absurd to argue, as do the fishing associations, both

[17] *See*, Pub. L. No. 101-618, § 205(a)(1) (providing that the federal government negotiate an Operating Agreement with the States involved in the Act), § 210(a)(2)(A)(i) (providing that § 204 of the Act, containing the so-called affirmative obligations on state officials, shall take effect only when all agreements under § 205 enter into effect).

> that the state agencies may not be ordered to implement the decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision. The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court.

This is a far cry from the implications of the 1985 Act's mandate that the States must be responsible for disposal of low-level radioactive waste.

CONCLUSION

The 1985 Act should be declared unconstitutional.

Dated: Albany, New York
March 23, 1992

Respectfully submitted,

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Nos. 91-543; 91-558; 91-563

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK,

Petitioners,

VS.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER THE COUNTY OF CORTLAND, NEW YORK

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ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER THE COUNTY OF CORTLAND, NEW YORK

PRELIMINARY STATEMENT

Petitioner the County of Cortland, New York ("Cortland County") respectfully submits this Reply Brief in response to the briefs of the federal and state respondents (collectively, the

"Respondents") and the briefs *amicus curiae* in support of the Respondents submitted by the Rocky Mountain Low-Level Radioactive Waste Compact, *et al.* (the "Sited Compacts"); the American College of Nuclear Physicians, *et al.* (the "Waste Generators"); the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"); and U.S. Ecology, Inc. (collectively, the "*Amici*"). For the reasons set forth below, this Court should reject the arguments of the Respondents and *Amici* and determine that the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPAA"), 42 U.S.C. §§ 2021b-2021j, violates constitutional principles of federalism.

STATEMENT OF THE CASE

The Respondents and *Amici* would have this Court believe that if it declares LLRWPAA unconstitutional and void, the entire compact system will disintegrate, current low-level radioactive waste ("LLRW") disposal facility development will screech to a halt, New York will attempt to force its LLRW on other states, and the nation will be deprived of needed biomedical activities generating LLRW. As is explained below, there is no reason to predict any of these dire consequences from the Court's invalidation of the statute.

Cortland County is not asking this Court to invalidate the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, title II, 99 Stat. 1859, or the other statutes in which Congress approved interstate compacts for the disposal of LLRW. To the extent that Congress's consent to those compacts is granted subject to the provisions of LLRWPAA, and would be upset by the invalidation of that statute, Congress could reratify the basic provisions of those compacts — including the right to exclude extra-regional waste — without attaching that condition. The compacts would then have an incentive to continue the operation of current facilities and the development of new ones, as now planned.

In addition, New York has no intention of dumping its LLRW on unconsenting states if LLRWPAA is held unconstitutional. In meeting the statute's 1990 milestone, New York certified that it "will be capable of providing for, and will provide for, the

storage, disposal, or management of any low-level radioactive waste generated within [the state] and requiring disposal after December 31, 1992." 42 U.S.C. § 2021e(e)(1)(C). As the federal respondents admit, *see* Brief for the United States ("U.S. Br.") at 13 n.25, "in January 1991, New York formally assured the sited States that its wastes would not become an involuntary burden on them."

Finally, even if LLRW disposal facility development slowed while Congress amended LLRWPAA to conform to constitutional requirements, LLRW generators would not be forced to suspend waste-generating activities. LLRW that is not disposed of in existing facilities can safely be stored for extended periods of time. *See* Joint Appendix ("J.A.") 55a-58a. The Nuclear Regulatory Commission ("NRC") has determined that even high-level radioactive waste can feasibly be stored for at least 100 years with no significant environmental impact.[1] *See* 55 Fed. Reg. 38474, 38510 (Sept. 18, 1990) (Waste Confidence Decision Review). The LLRW generated by nuclear power plants thus could also practicably be stored on-site. *See* J.A. 55a-58a. In addition, major portions of Class A medical and academic waste (*e.g.* animal carcasses) could be reduced in volume by approximately 99 percent by incineration, and the resulting small quantity of ash could be stored temporarily on-site.[2] *See* J.A. 56a. The calamitous repercussions predicted by the Respondents and *Amici* as the inevitable result of invalidating LLRWPAA are thus illusory.

---

[1] This determination confirms that the NRC's consistent opposition to storage of LLRW is based not on considerations of practicality, safety, or environmental protection but instead on its desire to enforce LLRWPAA. *See* J.A. 70a. That desire is manifest in the NRC's current consideration of a rule that would require LLRW generators to ask the states to take title to LLRW after 1995, even if they were not otherwise so inclined, as a condition to receiving NRC approval for storing such waste on-site after December 31, 1995. *See* U.S. NRC Secy-90-318, Low-Level Radioactive Waste Policy Amendments Act Title Transfer and Possession Provisions (Sept. 12, 1990).

[2] Class A waste accounts for 97 percent, by volume, of all the LLRW for which the states are required to provide disposal capacity under LLRWPAA. *See* Brief of U.S. Ecology at 5. By radioactivity, the vast majority of LLRW is Class C waste generated primarily by nuclear power plants. *See* J.A. 50a-51a.

ARGUMENT

POINT I

THE OBLIGATION IMPOSED ON THE STATES TO PROVIDE FOR LLRW DISPOSAL IS THE PROPER SUBJECT OF THIS COURT'S REVIEW

The Respondents and *Amici* attempt to persuade this Court that LLRWPAA's unprecedented direct commands to the states are nothing out of the ordinary.[3] To this end, the federal respondents and the Sited Compacts deny that LLRWPAA imposes upon the states an obligation to provide for LLRW disposal and ask the Court to examine in isolation only the enforcement provisions of the statute. *See, e.g.*, U.S. Br. at 21-22; Brief *Amici Curiae* of Sited Compacts in Support of Respondents ("Sited Compacts' Br.") at 10. As is explained below, this approach disregards the plain language of the statute and is inconsistent with fundamental principles of statutory construction.

A. *The Plain Language of the Statute Imposes an Affirmative Obligation on the States to Provide for LLRW Disposal*

"[S]tatutory interpretation begins with the language of the statute itself." *See Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990). Congress may generally be presumed to express its purpose through the ordinary meaning of the words it uses. *See Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Thus, absent clearly expressed legislative intent to the contrary, the plain language must ordinarily be

[3] For example, the LLRW disposal problem is treated as a routine matter of land use regulation. *See* Brief of Respondents, States of Washington, Nevada and South Carolina at 24; Brief *Amici Curiae* of Sited Compacts in Support of Respondents at 24. This suggestion is absurd in view of the states' complete lack of authority to regulate LLRW for the protection of their citizens against radiation hazards. *See Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205-16 (1983).

regarded as conclusive. *See Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987). As is explained below, the plain language of LLRWPAA imposes affirmative obligations upon the states.

LLRWPAA sets forth unambiguously the states' responsibilities for disposal of LLRW. The statute provides in pertinent part:

> Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of — (A) low-level radioactive waste generated within the State . . .; (B) low-level radioactive waste described in subparagraph (A) that is generated by the Federal Government except [for three categories of LLRW] . . . .

42 U.S.C. § 2021c(a)(1). Even in isolation from the remainder of the statute, the plain language of this provision creates an inescapable obligation: The states, and the states alone, are required to provide for the disposal of all LLRW generated privately, by the states, or, in some cases, by the federal government itself.

The Sited Compacts would have this Court interpret the mandate of section 2021c(a)(1) merely as a "statement of policy, which was borrowed from the original 1980 Act." Sited Compacts' Br. at 19. The policy statement in the Low-Level Radioactive Waste Policy Act of 1980 (the "LLRW Policy Act") differs crucially, however, from the direct order issued in section 2021c(a)(1) of LLRWPAA. In the LLRW Policy Act, Congress declared the "*policy* of the Federal Government that — (A) each State is responsible for providing for the . . . disposal of low-level radioactive waste generated within its borders . . . ." Pub. L. No. 96-573, § 4(a)(1), 94 Stat. 3348 (emphasis added). When Congress enacted LLRWPAA, however, it chose to eliminate the description of this responsibility as a mere "policy" and decreed instead that "[e]ach State *shall be* responsible" for LLRW disposal. 42 U.S.C. § 2021c(a)(1) (emphasis added).

The essential difference between the provisions of the original and the amended statute should not be ignored when interpreting LLRWPAA. Rather, this Court should "give effect to the subtleties of language that Congress chose to employ," where, as here, Congress amended specific sections of a statute. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986).[4] Where language limiting the effect of a federal statute is intentionally deleted, this Court may presume that Congress intended to eliminate the limitation. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983). The statement that the states "shall be responsible" for LLRW disposal should thus be read consistently with its ordinary meaning to "strengthen[] the 1980 Act," Brief of the AFL-CIO as *Amicus Curiae* in Support of Respondents ("AFL-CIO Br.") at 15 n.35, by transforming merely hortatory language into a direct affirmative command to the states.[5]

In addition to the plain language and legislative history of section 2021c(a)(1), this Court should consider the structure of LLRWPAA as a whole in determining the meaning of that provision. *See United States v. Morton*, 467 U.S. 822, 828 (1984). Examination of that structure reveals that LLRWPAA includes a series of penalties designed to compel compliance with Congress's basic mandate to the states. *See* 42 U.S.C. §§ 2021e(d)(2)(C) (the "Take Title Provision"); 2021e(e)(2) (authorizing surcharges and denial of access to existing LLRW disposal facilities as "[p]enalties for failure to comply"). Most significantly, the Take Title Provision directly punishes states that fail to comply with their obligation to provide for LLRW disposal by 1996 by compelling those states to take title to all LLRW offered to them by in-state generators and either to take possession of that

[4] *See Immigration and Naturalization Service v. Hector*, 479 U.S. 85, 90 n.6 (1986) (noting that the plain language of a statute carries additional weight when the language has been the subject of amendment).

[5] The Sited Compacts thus miss the point of the petitioners' claim in arguing that "[t]his Court has never based its federalism decisions on the presence or absence of words like 'shall' in a challenged federal statute." Sited Compacts' Br. at 19. The basis of the petitioners' complaint is not Congress's usage of the word "shall" but its attempt to impose inescapable obligations on states that would prefer to remain inactive in the LLRW disposal field.

waste or to assume liability for all damages arising out of their failure to take possession. The imposition of such a "far-reaching, difficult, and punitive" measure, 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston), confirms that section 2021c(a)(1) should be read not merely to declare federal policy but to impose an affirmative obligation on the states.

B. *The Federal Respondents' Focus on Unchallenged Enforcement Provisions Is Misplaced*

The federal defendants provide no defense of the fundamental obligation imposed on the states to provide for LLRW disposal.[6] They instead attempt to divert this Court's attention from the obligation — which properly constitutes the core of this case — by treating certain incentives and penalties provided under LLRWPAA (and not separately challenged by the petitioners) as if they were the "basic provisions" subject to this Court's review.[7] U.S. Br. at 21-25; *see* Sited Compacts' Br. at 10, 21. By defending those enforcement measures in isolation from the states' fundamental obligation to provide for LLRW disposal, the federal respondents effectively argue that lawful means should justify an unconstitutional end. Their argument should be rejected for the reasons set forth below.

[6] In the guise of defending the Take Title Provision, the federal respondents effectively acknowledge the state's obligation to provide for LLRW disposal and seek to justify it by arguing that "States can meet the responsibility imposed by the Act" in a variety of different ways. U.S. Br. at 34. The range of state discretion as to *how* to comply with LLRWPAA is irrelevant here, however, where the petitioners challenge Congress's authority to deprive the states of the choice *whether* to take responsibility for LLRW disposal. By usurping that decisionmaking authority, Congress fails the "aggrandizement test" for consistency with constitutional principles of federalism described in the Sited Compacts' Br. at 13.

[7] The federal respondents do not include the Take Title Provision — the only penalty provision that is directly subject to challenge in this action — among the "basic provisions" of the statute. Cortland County discusses the arguments of the Respondents and *Amici* in defense of the Take Title Provision in Point III below.

1. *LLRWPAA Does Not Condition Receipt of Federal Grants upon Compliance with Federal Regulations*

The federal respondents first argue that the payments authorized pursuant to 42 U.S.C. § 2021e(d)(2)(B)(i)-(iv) as financial incentives for reaching certain milestones are lawful as an exercise of congressional spending power. *See* U.S. Br. at 22-23. LLRWPAA is not, however, an exercise of that power.

Contrary to the misleading suggestion of the federal respondents, *see id.* at 12, 22-23, Congress has appropriated no federal funds whatsoever for direct aid to the states – conditional or otherwise. The so-called "federal payments to the States," *id.* at 12; *see id.* at 26, are merely rebates of surcharges paid by LLRW generators and held in escrow by the Secretary of Energy. *See* 42 U.S.C. § 2021e(d)(1), (2)(A)-(B). Congress's alleged authority to enact LLRWPAA must therefore be found, if at all, in the Commerce Clause. The federal respondents' analysis of the rebates as an exercise of the spending power, *see* U.S. Br. at 22-23, is entirely irrelevant and obfuscates the real issue here.

Moreover, unlike the states subject to regulation in the conditional funding cases, *see, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding funding conditioned upon adoption of a minimum drinking age of 21 years), which could avoid compliance with federal requirements by refusing the conditioned federal grants, *see Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), New York cannot escape its responsibility to provide for LLRW disposal simply by choosing to decline the rebates provided under LLRWPAA.[8] Because the fundamental obligation to provide for such disposal persists irrespective of New York's choices, that obligation is far more intrusive

[8] The rebates in fact do not serve to enforce the basic obligation directly but merely operate as an incentive to meet certain statutory milestones that constitute steps in the process of developing disposal capacity. Even if the states choose not to meet the milestones, they cannot escape the basic obligation to provide for LLRW disposal.

upon state sovereignty than any statutory requirement upheld as an exercise of congressional spending power. Indeed, as Cortland County shows in its main brief and in Point II below, Congress exceeded its authority under the Commerce Clause in imposing that obligation.

2. *Congress's Power to Authorize State Discrimination Against Interstate Commerce Has No Bearing on the Central Issue of This Case*

The federal respondents also defend the constitutionality of sections 2021e(d)(1) and 2021e(e)(1)-(2) of LLRWPAA, which authorize host states in sited compacts to discriminate against LLRW generated outside the compact region. *See* U.S. Br. at 24-25. Congress's power to authorize states to take action that would otherwise be impermissible as an interference with interstate commerce is not, however, the subject of this action. The question presented by the instant challenge of LLRWPAA is whether the end that Congress is pursuing through the use of that lawful means – exclusive state responsibility for LLRW disposal – comports with constitutional requirements. The "commonplace form of *most* of the Act's provisions," U.S. Br. at 21 (emphasis added), is irrelevant where the obligations subject to challenge are unprecedented and unconstitutional. If this Court finds, as it should, that the ultimate responsibility imposed upon the states in LLRWPAA is inconsistent with fundamental principles of federalism, the statute must be declared unlawful and void.

POINT II

LLRWPAA IS INCONSISTENT WITH PRINCIPLES OF FEDERALISM

The Respondents attempt to defend the constitutionality of LLRWPAA by arguing that it does not seriously intrude upon state sovereignty. Toward this end, they argue that the statute was the least restrictive alternative available to Congress to solve the national LLRW disposal problem. They also treat the statute enacted by Congress as if it were merely a contract among the states. As is explained below, these arguments rest upon false dichotomies and inappropriate analogies.

A. *In Enacting LLRWPAA, Congress Rejected Less Restrictive and Unquestionably Constitutional Legislative Alternatives*

The federal respondents and *Amici* would have this Court believe that there were only two options available in 1985 to avert the potential shortage of LLRW disposal capacity: Either Congress could enact LLRWPAA or Congress could preempt the states' authority altogether and impose a federal solution. *See* U.S. Br. at 37-38; Sited Compacts' Br. at 15, 16; Brief of Waste Generators at 21-22; AFL-CIO Br. at 19; Brief of U.S. Ecology at 15. Although it should not be assumed that preemption is necessarily the more intrusive option, *see Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 786-87 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part), the national LLRW disposal problem did not present Congress with such a limited choice. Congress could have effectively – and constitutionally – addressed the problem if it had retained federal responsibility for LLRW disposal when the states chose not to administer a disposal program and had provided federal financial aid to the states.

These less restrictive alternatives, which had been successfully employed in prior environmental statutes, *see, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*,[9] would have promoted congressional accountability by requiring that the federal government bear some of the costs of its LLRW disposal policy. These alternatives would also have better reflected the LLRW disposal recommendations of the National Governors Association ("NGA"), which provided that the states "*should accept* primary responsibility" for LLRW disposal,[10] J.A. 114a (emphasis added),

[9] Section 1342(b) of the Clean Water Act authorizes, but does not require, state administration of the permit system for discharge of pollutants. Sections 1259, 1285(c), 1329(h), and 1381 establish federal grants for training programs, waste treatment works, management programs, and state water pollution control revolving funds.

[10] The unmistakably hortatory character of this language contrasts sharply with LLRWPAA, which provides that the states "shall be responsible." 42 U.S.C. § 2021c(a)(1).

and called for federal funding of state LLRW disposal planning activities, *see* J.A. 130a-33a. Thus, had it chosen to do so, Congress could have solved the LLRW disposal problem consistently with the states' preferences without shifting the entire responsibility to the states.[11]

The real choice presented to Congress was thus whether to retain accountability for its actions or to structure LLRWPAA to ensure that state officials alone bore the political burdens of federally mandated LLRW disposal programs. Had Congress provided for *voluntary* state responsibility, citizens of states that chose to administer their own programs could properly have held state officials accountable, whereas citizens of states that chose to deploy their resources elsewhere could have held federal officials responsible for the administration of LLRW disposal programs. State voters could also appropriately have held state officials accountable for the choice whether or not to accept responsibility for such programs. Such genuinely cooperative federal and state implementation of LLRW disposal policy would have promoted the values of governmental responsiveness and democratic participation, *see* U.S. Br. at 38, far better than LLRWPAA, which mandates that the LLRW problem "be worked out *entirely* by the States," Sited Compacts' Br. at 14, and thus blurs the lines of political accountability.[12]

[11] Neither the Respondents nor the *Amici* suggest that the federal government has an interest in avoiding responsibility for LLRW disposal. Congress's only legitimate goal in enacting LLRWPAA was to remedy the perceived shortage of disposal facilities. Because that purpose could have been achieved without imposing inescapable obligations on the states, the federal interest in enforcing LLRWPAA's affirmative mandate cannot override the states' interest in protecting their sovereignty.

[12] In view of "the federal government's refusal to enter the field," Sited Compacts' Br. at 19, the insinuation that the *states* were asking Congress to allow them to dodge responsibility for their own actions, *see* U.S. Br. at 38, lies ill in the mouth of the federal respondents.

B. *LLRWPAA Cannot Properly Be Regarded as a Compact Among the States*

The Respondents and *Amici* also attempt to evade the constitutional implications of a federal statute that imposes inescapable affirmative obligations on the states by treating LLRWPAA as if it were itself, or implemented, a 50-state compact. *See* U.S. Br. at 38; Brief of Respondents, States of Washington, Nevada and South Carolina ("Sited States' Br.") at 2, 8, 10, 13, 15; Sited Compacts' Br. at 16-17; Brief of Waste Generators at 21-22. The metaphor is inapt for three reasons.

First, LLRWPAA cannot be read as a compact among the states.[13] Prior to its enactment, LLRWPAA did not receive formal approval by the states, whether by state legislative enactment or by referendum.[14] Nor did Congress merely ratify terms drafted and expressly affirmed by the states when it enacted that statute. At best, LLRWPAA represents selective congressional endorsement of recommendations offered by a lobbying group for the states.

Second, the compact analogy is inappropriate not only because LLRWPAA lacks the legal indicia of a formal interstate compact but also because Congress substantially altered the terms of the NGA's recommendations when it enacted LLRWPAA. Instead of retaining partial administrative and financial responsibility for LLRW disposal, as the NGA suggested, Congress transferred that responsibility exclusively to the states, thereby relieving itself altogether of the burdens associated with a politically unpopular program.

Third, even if LLRWPAA could be construed as some sort of agreement among the states, New York is not, contrary to

[13] The structure and substance of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, title II, 99 Stat. 1859, which is an example of a statute approving interstate compacts, contrasts sharply with that of LLRWPAA.

[14] Thus, contrary to the suggestion of the sited states, *see* Sited States' Br. at 17 n.27, the states, as sovereigns, did not consent to the statutory provisions challenged here.

the Respondents' insinuation, *see* U.S. Br. at 38; Sited States' Br. at 23-25, attempting to reap the benefits of its bargain without assuming the burdens.[15] New York has accepted the burdens of complying with the statute, albeit unwillingly, by taking the actions required to meet the 1986, 1988, and 1990 milestones.[16] Moreover, as is explained above, New York will be fully capable of managing its own LLRW at the end of this year. The attempt to portray the instant challenge as an effort to foist the LLRW generated in New York on unconsenting states is therefore unfounded.

POINT III

CONGRESS EXCEEDED ITS AUTHORITY IN ENACTING THE TAKE TITLE PROVISION

By according the Take Title Provision separate attention in their briefs, the Respondents implicitly recognize the unique character of that provision and the grave constitutional questions it presents. As is explained below, those questions remain unanswered by the defenses of the Take Title Provision offered by the Respondents and *Amici*.

[15] Indeed, New York has already accepted and continues to bear more than its share of the burdens of LLRW disposal. New York permitted LLRW to be disposed of at West Valley for 12 years, until radioactive contamination forced closure of the facility. New York has spent substantial sums just to maintain the site, and full cleanup costs have yet to be determined. *See* J.A. 65a. Thus, even if New York were now seeking to export all of the LLRW generated within its borders, its position would differ little from that of the State of Nevada, which hosts a facility that is scheduled to close at the end of the year and plans thereafter to ship its LLRW out-of-state.

[16] As the record reflects, the penalties set forth in LLRWPAA provided the impetus for New York's compliance with its mandates. *See* J.A. 80a-81a. The decision to respect the law, by complying with LLRWPAA's terms while contesting its constitutionality, cannot be construed as consent to the provisions challenged here.

A. *The Federal Respondents Ignore the Substance of the Take Title Provision*

Whereas the federal respondents sought (unnecessarily) to defend the incentives and penalties other than the Take Title Provision by analyzing Congress's power to confer conditional grants and to authorize discrimination against interstate commerce, *see* U.S. Br. at 21-25, their defense of the Take Title Provision ignores Congress's attempt to compel the states to assume ownership of dangerous radioactive waste and liability for any damages arising out of their failure to take possession of it.[17] The federal respondents seek to temper the extremity of that provision by arguing that the states can simply avoid the punishment it effects.[18] *See id.* at 33-36. Such an argument is like claiming that the death penalty is not a grievous punishment because a person can avoid committing capital crimes. This Court should not so easily be diverted from consideration of the substance of the Take Title Provision.[19]

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[17] The federal defendants instead focus on the constitutionality of the obligation enforced by the Take Title Provision – compelling the states to provide for LLRW disposal – which is addressed in Point II above and in Points II and III of Cortland County's main brief.

[18] New York cannot so easily avoid application of the Take Title Provision. The ostensible options of entering a compact or contracting with a sited compact for disposal of New York's LLRW, *see* U.S. Br. at 34, are not necessarily available to New York. Such agreements require the acquiescence of other sovereign states, which New York cannot compel. Nor can New York leave LLRW disposal entirely to market forces and leave facility regulation to the NRC. The development of 14 LLRW disposal facilities, as is currently contemplated, *see id.* at 10 n.19, makes the private development of a disposal facility in New York economically infeasible. *See* J.A. 53a. Thus, notwithstanding New York's ability to provide for storage or other management of LLRW generated within its borders, unless the State is able to select a disposal method, locate a facility site, construct the facility, and obtain NRC licensing by 1996 – none of which have yet been accomplished – the State will be subject to the full punitive force of the Take Title Provision.

[19] Similarly, this Court should not be misled by the federal respondents' belated claim that the petitioners' challenge of the Take Title Provision is not ripe for review. The likelihood that New York will be able to complete the full range

(Footnote continued)

To the extent that the *Amici* address the substance of the Take Title Provision, their defenses are inadequate. Contrary to the Waste Generators' claim, *see* Brief of Waste Generators at 25, the Take Title Provision does not merely impose a financial burden upon the states. The Take Title Provision prevents New York from requiring LLRW generators to make arrangements for the disposal of their own waste, *see* AFL-CIO Br. at 18, or conditioning the generation of such waste on the availability of disposal facilities.

B. *There Is No Precedent for the Take Title Provision*

The federal respondents attempt to defend the Take Title Provision by arguing that other federal directives to the states have been found constitutional. *See* U.S. Br. at 30-32. The two cases cited as alleged authority for statutory commands to state legislatures and executive officials, *see Puerto Rico v. Branstad*, 483 U.S. 219 (1987); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), were not, however, decided pursuant to the Commerce Clause. Similarly, having cited no authority for their claim that the Commerce Clause entitles Congress to perform the dispute-resolution function allocated to this Court under Article III, section 2 of the Constitution, *see* U.S. Br. at 32, the federal respondents cannot justify Congress's actions in enacting the Take Title Provision by appeal to this Court's alleged orders to state officials. *See* U.S. Br. at 31-32 and cases cited there-in.[20] Finally, this Court has never held that the commerce power authorizes

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of activities required to put a disposal facility into operation by 1996, *see supra* note 18, is small indeed. Moreover, in moving for summary judgment, the federal respondents declined to raise that claim, which rests upon disputed issues of fact that cannot be decided upon the present record.

[20] The federal respondents attempt to equate this Court's adjudication of resource allocation conflicts, *see Colorado v. New Mexico*, 459 U.S. 176 (1982); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *Wyoming v. Colorado*, 309 U.S. 572 (1940), or interstate nuisance actions, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Missouri v. Illinois*, 200 U.S. 496 (1906), with the legislative resolution of conflicts among the states purportedly effected by LLRWPAA. *See* U.S. Br. at 32. Although the analogy has some superficial appeal when applied to the

(Footnote continued)

direct congressional commands punishing the states by compelling them to assume ownership of contaminated private property and has in fact repeatedly suggested that attempts to impose such inescapable obligations would exceed Congress's authority. *See* Cortland County's Petition for a Writ of Certiorari at 17-28, 34-45 and cases cited therein.

C. *Congress Avoided Political Accountability In Enacting the Take Title Provision*

The federal respondents effectively concede that if the process-based standard for compliance with the Tenth Amendment adumbrated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is interpreted merely to require an opportunity for states to participate in the federal legislative process, it is possible that such a "daunting standard" could never be met.[21] *See* U.S. Br. at 27. Because the practical impossibility of meeting the standard (so construed) leaves Congress completely unfettered by the affirmative limits on federal action imposed by the constitutional structure, *see Garcia*, 469 U.S. at 556, that interpretation should be rejected in favor of one that finds political protection for state sovereignty in congressional accountability for national policy. *See* Brief of Cortland County

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basic obligation imposed upon the states to provide for LLRW disposal, it has no bearing upon the Take Title Provision, which pits the states against in-state LLRW generators. Even as applied to the basic obligation, the analogy fails because LLRWPAA mandates neither the allocation of shared natural resources nor the remediation of out-of-state problems tortiously created by the shipment of LLRW.

[21] The Respondents nevertheless ask this Court to apply that standard. *See* U.S. Br. at 26-29; Sited States' Br. at 17-19. Even if it were applied, however, the Take Title Provision would fail to meet it. That provision was not part of the NGA's recommendations, and no state official had any opportunity to comment upon it prior to its "last minute" enactment. *See* Sited Compacts' Br. at 28. The mere fact that citizens of the states elect members of Congress – whose political interests are directly served by the statute – cannot be relied upon to protect the conflicting interests of the states any more than the fact that individuals elect members of Congress can be relied upon to protect the constitutional rights of individuals.

at 20-22. Because Congress structured the Take Title Provision to avoid such accountability,[22] *see id.* at 23-26; *see also* Point II(A) *supra*, the provision should be found unconstitutional and void.

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[22] The Take Title Provision indisputably severs the interests of the states from those of private LLRW generators by relieving those generators of the liabilities ordinarily attendant upon ownership and possession of the waste and shifting them exclusively to the states. That Congress bears none of the financial or administrative costs of the Take Title Provision is also clear on its face. Thus, in enacting the Take Title Provision, Congress evaded both of the political checks that keep it accountable when it passes legislation that is intrusive upon state sovereignty. *See* Brief of Cortland County at 23-25.

CONCLUSION

For the reasons set forth herein, in Cortland County's main brief, and in its petition for a writ of certiorari, Cortland County respectfully requests that the decisions of the courts below be reversed and that LLRWPAA be declared unconstitutional and void in its entirety.

Dated: New York, New York
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

THE STATE OF NEW YORK, et al,
Petitioners,

v

THE UNITED STATES OF AMERICA, et al,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF MICHIGAN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

WHETHER THE LOW-LEVEL RADIOACTIVE POLICY AMENDMENTS ACT OF 1985 WHICH MANDATES A STATE TO EXERCISE ITS EXECUTIVE AND LEGISLATIVE POWERS VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IN THE EXERCISE OF THOSE POWERS IT COMPELS A STATE TO BE ACCOUNTABLE TO THE UNITED STATES CONGRESS RATHER THAN TO THE MAJORITARIAN WILL OF ITS CITIZENS.

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INTEREST OF THE STATE OF MICHIGAN

The decision in these cases by the United States Court of Appeals for the Second Circuit presents important constitutional questions pertaining to the extent to which federal authority under the Commerce Clause can impinge upon the autonomy of independent sovereign States within this Union.

Petitioners are challenging the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 USC §§ 2021b-2021j (1985 Act) on state sovereignty grounds which have their basis in the Tenth Amendment of the United States Constitution and the Guarantee Clause found in Art IV, § 4 of the United States Constitution. Michigan supports the arguments advanced by Petitioner State of New York and amicus State

of Connecticut that the 1985 Act violates the state sovereignty implicit in the Tenth Amendment of the United States Constitution. In addition, Michigan urges this Court to find that the 1985 Act violates State sovereignty implicit in the Guarantee Clause of the United States Constitution requiring the United States to guarantee to every State in this Union a republican form of government. New York has raised this issue merely as an element of State sovereignty and not as an independent ground for declaring the 1985 Act unconstitutional. Petitioner County of Allegany has specifically raised this issue as it relates to a local unit of government. Michigan asserts that the Guarantee Clause most directly and properly relates to a State.

In 1980, the United States Congress passed the Low-Level Radioactive Waste Policy Act, 42 USC §§ 2021b et seq, P.L. 96-573 (1980 Act). The 1980 Act was amended in 1985 by the passage of the 1985 Act. The 1985 Act mandates that each State must provide for the disposal of all low-level radioactive waste (LLRW), generated within its borders except for defense related LLRW generated by the federal government. Pursuant to the policy of the 1980 Act, Michigan responded by joining a compact in 1982 known as the Midwest Interstate Low-Level Radioactive Waste Management Compact (Midwest Compact). The United States Congress consented to the Midwest Compact only after passage of the 1985 Act which mandated its 1980 policy. In fact, Congress conditioned its consent upon the

mandates contained within the 1985 Act. The United States Congress has made no effort to provide financing to the States obligated to execute this federal policy.

The State of Michigan has taken numerous executive and legislative actions in furtherance of the congressional mandates contained in the 1985 Act. The following list represents some of those actions taken.

1. Entering into the Midwest Interstate Low-Level Radioactive Waste Compact, through the passage of legislation, 1982 PA 460.

2. The passage of legislation, 1987 PA 204, creating a Low-Level Radioactive Waste Authority to carry out the State's responsibilities to provide for the disposal of LLRW.

3. The passage of legislation, 1987 PA 203, to provide for Michigan Department of Public Health oversight over the siting of a Low-Level Radioactive Waste Disposal Facility.

4. The appointment of a Low-Level Radioactive Waste Authority Director and a Commissioner to the Midwest Interstate Low-Level Radioactive Waste Compact.

5. The Amendment of a State statute, 1987 PA 113 in order to allow for the previously prohibited disposal of LLRW in Michigan.

In June of 1987, Michigan was selected by the Midwest Interstate Low-Level Radioactive Waste Management Commission (Commission) as the first host State for a regional low-level radioactive waste disposal facility.

As part of its responsibility to develop a LLRW disposal facility, Michigan was required to adopt siting criteria. The siting criteria were completed on May 16, 1989 after an extensive process which considered such factors as the extent of valuable fresh water

sources within the State, in light of the mandate of Mich Const 1963, Art IV, § 52 which provides:

> Sec. 52. The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

The siting process in Michigan was funded pursuant to a pre-operational funding agreement between Michigan and the Commission. In August of 1990 the Commission threatened to withhold any further funding unless Michigan changed its siting criteria by making them less stringent. Michigan refused to change these criteria. The Commission withheld further funding.

In November of 1990 the sited States of South Carolina, Washington, and Nevada denied access to their LLRW disposal facilities to LLRW generators located within Michigan. Michigan generators are, therefore, storing their LLRW on site. In July of 1991 the Commission voted to revoke Michigan's membership in the Compact.

The State of Michigan is challenging the constitutionality of the 1985 Act on State sovereignty and Guarantee Clause grounds in State of Michigan, et al v United States of America, et al, US District Court, WD of Michigan, Case No. 5-90-CV-27. Michigan is currently appealing the dismissal of this case to the United States Court of Appeals for the Sixth Circuit, Docket No. 91-2281.

The Court of Appeals has ordered that the case be held in abeyance pending the outcome of this case.

SUMMARY OF ARGUMENT

The United States Constitution has established a federal form of government in which a balance of power exists between the national government and the sovereign States comprising the Union represented by the national government. This balance of power inures to the benefit of individual citizens whose rights are protected when neither level of government becomes all-powerful.

Congress is restricted in the exercise of its delegated Commerce Clause authority by the retained rights of the sovereign States comprising the Union.

This Court has recognized the existence of such limits, but the nature and content of the limits has proven difficult to delineate. This difficulty is most readily apparent in National League of Cities v Usery, 426 US 833 (1976), and Garcia v San Antonio Metropolitan Transit Authority, 469 US 528 (1985).

The Garcia case articulated the political process doctrine as the principal means of insuring the protection of a State's sovereignty. The Court recognized that additional limits exist which restrict Congress under its delegated Commerce Clause authority. However, in the context of the Garcia case, this Court held that it need not determine the extent of these limits. When, as in the case of the 1985 Act, Congress has so

intrusively impinged on a State's sovereignty, it is appropriate to ascertain the limits on congressional authority and to determine whether Congress has exceeded those limits.

The 1985 Act is extraordinarily intrusive upon the autonomy of the sovereign States. The extreme nature of this intrusion is apparent from a review of the mandates of the 1985 Act which compel States to engage in the commerce of disposing of LLRW. It goes well beyond statutes compelling States to engage in the regulation of commerce. The intrusion is even more extreme when the punitive measures to compel the States to engage in the commerce are considered. These punitive measures involve a shifting of title to, and liability for, LLRW

from either the private sector or in some cases the federal government itself.

The Guarantee Clause of the United States Constitution guarantees to every State a republican form of government. A republican form of government is one in which the people choose their rulers who in turn pass their own laws through the majoritarian process.

It is appropriate to rely upon the protections afforded by the Guarantee Clause as a restraint on Congress in the exercise of its delegated authority under the Commerce Clause. Michigan urges the adoption by the Court of the analysis of this restraint by Professor Deborah Jones Merritt from the University of Illinois School of Law. While this suggested Guarantee Clause analysis has never been

directly applied by the Court, it is consistent with the rationale and result in several decisions which have recognized that a congressional enactment which commandeers either the legislative or executive branches of the State government is constitutionally suspect.

The 1985 Act commandeers both the legislative and executive branches of a State's government. Its mandates implement federal policies and make State governments accountable to private entities and to the federal government rather than to a State's own citizens thereby denying the States a republican form of government as guaranteed to them by the Guarantee Clause of the United States Constitution.

ARGUMENT

I

CONGRESS IS LIMITED IN THE EXERCISE OF ITS COMMERCE CLAUSE AUTHORITY BY THE RIGHTS RETAINED BY THE SOVEREIGN STATES UNDER THE FEDERAL SYSTEM.

This Court has recognized "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . ." INS v Chadha, 469 US 919, 951 (1983). As Justice Powell observed in his dissent in Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 565 (1985) "[t]he Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the states." (footnote omitted). Michigan asserts that the 1985 Act is a clear example where the

"hydraulic pressure" upon the United States Congress to resolve the highly charged political issue of LLRW disposal operated to the extreme and resulted in Congress exceeding the outer limits of its Commerce Clause authority.

The Framers of the Constitution recognized advantages in dividing power between the national and State governments. Madison asserted that "[i]n the compound Republic of America a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51 at 351 (J. Madison) (J. Cooke Ed. 1961). Alexander Hamilton similarly opined that: "[P]ower being almost always the rival of power the gen-

eral government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government." The Federalist No. 28 at 179 (A. Hamilton) (J. Cooke Ed. 1961). In a viable federal system, the power retained by the States will serve as a check on the national government exceeding the outer limits of its authority. This balance of power is upset when the States lose their retained sovereign rights.

This Court has recently recognized the importance of Madison's "double security." In Gregory v Ashcroft, 501 US ___, 115 L Ed 2d 410, 423 (1991), Justice O'Connor writing for the majority concluded:

> If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

In passing the 1985 Act, Congress has exceeded constitutional restraints on its authority. Michigan urges this Court to apply those restraints, thereby re-establishing the proper constitutional balance.

Congress does not have unlimited power under its delegated Commerce Clause authority to intrude on the sovereignty of the independent States. This Court has struggled with defining those limits since National League of Cities v Usery, 426 US 833 (1976). In Usery, this Court adopted what has become known as the

"traditional governmental functions" doctrine as the means by which Courts should determine if Congress has exceeded its Commerce Clause authority by intruding on State sovereignty. The difficulties inherent in applying the traditional governmental functions doctrine became apparent during the years following the Usery decision. Finally, in Garcia this Court repudiated the traditional governmental functions test as unworkable.

> Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest. That case, accordingly, is overruled.
> Garcia, 469 US at 531.

The traditional governmental functions doctrine was repudiated at the same time

that the majority affirmed the principles of federalism and state sovereignty.

> [T]he text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for "[b]ehind the words of the constitutional provisions are postulates which limit and control." [citations omitted] National League of Cities reflected the general conviction that the Constitution precludes "the National Government [from] devour[ing] the essentials of state sovereignty." [citations omitted] In order to be faithful to the underlying federal premises of the Constitution, Courts must look for the "postulates which limit and control."
>
> What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause but rather the nature and content of those limitations.
> Garcia, 469 US at 547.
> (Emphasis added).

After rejecting the traditional governmental functions doctrine articulated in Usery which had been based upon the Tenth

Amendment, this Court in Garcia struggled with the language of the Tenth Amendment which on its face does not appear to support any affirmative limit on Congressional power. Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Columbia Law Review 1, 12 (1988). In fact, the Court previously recognized that the Tenth Amendment language "states but a truism that all is retained which has not been surrendered." United States v Darby, 312 US 100, 124 (1941).

In its efforts to determine the limitations on the Commerce Clause the majority in Garcia developed the political process doctrine. Unlike the traditional governmental functions doctrine developed in Usery, the political process doctrine

does not appear to be rooted in any constitutional mandate. Rather, it is based principally upon the federal structure itself.

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.
> Garcia, 469 US at 552.

The majority in Garcia did not hold that the political process doctrine was the only means of protecting a State's sovereign interests against the intrusion of Congress under its Commerce Clause authority. The initial enunciation of the political process doctrine in Garcia states:

> . . . the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.
> Garcia, 469 US at 550-551.
> (Emphasis added).

By speaking in terms of "principal means" in commencing its discussion of the political process doctrine, the majority was indicating that the doctrine is not the exclusive means for protecting State sovereignty. The Court recognized this fact when, at the conclusion of its discussion of the doctrine, it stated:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional actions--the built-in restraints that our system provides through state participation and federal governmental action.
> Garcia, 469 US at 556.
> (Emphasis added).

By characterizing the political process doctrine as the "principal limit" the Court necessarily implies that there are other limits as well. In fact, the Court explicitly determined that under the specific facts of Garcia it need not "define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." Garcia, 469 US at 556. The 1985 Act compels this Court to define those limits.

Justice Brennan in South Carolina v Baker, 485 US 505, 512 (1989) (plurality opinion), did suggest that Garcia stands for the proposition that the political process doctrine is the exclusive protector of State sovereignty against intrusion by Congress, but this reading

ignores the analysis discussed above. Justice Scalia concurring in part and concurring in the judgment in South Carolina states that Justice Brennan's conclusion that the "National Political Process" is the State's only constitutional protection "misdescribes" the holding in Garcia. South Carolina, 485 US at 528.

In fact, the majority in Garcia did recognize the existence of limits on the Federal Government's power to interfere with State functions. Garcia, 469 US at 547. Furthermore, the majority even recognized some constitutionally mandated limits on Congress' power.

> With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace.
> Garcia, 469 US at 550.

While recognizing that such exceptions are rare, Michigan asserts that one such exception is the Guarantee Clause in Art IV, § 4 guaranteeing to every State in the Union a republican form of government.

II

CONGRESS HAS EXCEEDED LIMITS IMPOSED UPON IT BY THE GUARANTEE CLAUSE IN ITS ENACTMENT OF THE 1985 ACT.

The 1985 Act was promulgated pursuant to Congress' delegated Commerce Clause authority. No other constitutional predicates such as the Spending Clause or the Civil War Amendments justify Congress' intrusion on State sovereignty. It has been held that the regulation of the disposal of low-level radioactive waste implicates the Commerce Clause. Philadelphia v New Jersey, 437 US 617

(1978), and Washington State Building and Construction Trades Council v Spellman, 684 F2d 627 (9th Cir. 1982), cert denied 461 US 913 (1983). However, with the 1985 Act Congress has gone beyond simply regulating commerce and has mandated that States take responsibility for the LLRW generated primarily by private entities and to a lesser extent by the federal government. The 1985 Act compels a sovereign State not just to regulate LLRW in lieu of federal regulation, but actually to engage in a specifically identified type of commerce.

This Court has recognized that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." Reeves, Inc. v Stake,

447 US 429, 437 (1980). Michigan asserts that there is also no indication of a constitutional plan to permit Congress to mandate that a State operate in the free market. It is the compulsion to engage in this commerce which Michigan asserts intrudes upon its sovereignty. Specifically, the Congressional mandate that sovereign States exercise their legislative and executive powers to engage in the commerce of LLRW disposal impinges upon the guarantee expressed in the United States Constitution of a republican form of government. The compulsion contained within the 1985 Act makes the legislative and executive branches of a sovereign State answerable not to the people who have elected these bodies, but to the United States Congress who is mandating these bodies to implement federal policy.

While the mandate to engage in the commerce of LLRW disposal by itself intrudes upon a State's sovereignty, the so-called "take title" and liability provisions of the 1985 Act make the intrusion on State sovereignty even more egregious. This provision of the 1985 Act, 42 USC § 2021e(d)(2)(C), requires that if States are unable to engage in the commerce of LLRW disposal by January 1, 1996, they must accept from private and federal generators of LLRW, both title to the LLRW and liability for all damages directly or indirectly related to the LLRW. This draconian punitive measure totally ignores the States' sovereignty. A review of the legislative history of the 1985 Act reveals the unprecedented punitive nature of this provision. Senator J. Bennett

Johnston, co-sponsor of the 1985 Act stated:

> This language insures that the State will not be able to avoid the financial consequences of failure to provide adequately for the disposal of its low-level radioactive waste, even though it may find a way to avoid taking title or possession in a timely manner . . . In the context of this amendment, the term "damages" includes both actual and punitive damages from actions taken against a generator or owner of waste . . .
>
> ***
>
> That means that if some generator of nuclear waste must close down, for example, by reason of failure of the State to accept possession and title to this nuclear waste then the State is responsible for all damages . . . It is a very far-reaching, difficult, and punitive provision, but we mean it to be precisely that. (emphasis added) Cong. Rec. 818113 (Dec. 19, 1985 Daily ed.) remarks of Senator Johnston.

The punitive nature of the take title provision appears to be unique among congressional enactments. Representative Edward J. Markey stated:

> One of the more controversial provisions in the Senate Bill relates to States assuming title and liability for waste in 1996 and requires states to reimburse generators for surcharges. I have requested the Congressional Research Service to study the constitutionality of such a requirement. Their findings, in a study dated December 16, 1985 found that these provisions raised constitutional issues under the Tenth and Eleventh Amendments. I agree. I cannot recall any statute which has ever sought to impose such a liability upon states. The provision may not pass constitutional challenge... (99 Cong. Rec., H 13077 Daily ed. December 19, 1985).

If the mandates in the 1985 Act are constitutional, there is nothing which would prevent federal legislation mandating that each State take title to, assume all liability for, and provide for the disposal of, all hazardous waste generated within its borders. In Michigan during 1986 a total of 3,800,000 tons of hazardous industrial waste was generated

compared to 383 tons of low-level radioactive waste. Michigan contends that the principles of federalism embodied in the United States Constitution do not contemplate or permit such a fundamental shift of liability from the private sector to a sovereign State. On the contrary, the United States Constitution contains specific language protecting the sovereignty of States and precluding the imposition of such onerous responsibilities which stem not from the actions of the State, but from private entities.

The Guarantee Clause of the United States Constitution set forth at Art IV, § 4 provides, in part, as follows:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . .

A republican government was defined by Associate Justice Wilson in Chisholm v

Georgia, 2 U.S. (2 Dall.) 419 (1793). In reference to the State of Georgia, Justice Wilson stated that "I know the Government of that State to be republican; and my short definition of such a Government is,--one constructed on this principle that the Supreme Power resides in the body of the people." Chisholm, 2 U.S. (2 Dall.) at 457. In In re Duncan, 139 US 449, 461 (1891), Chief Justice Fuller writing for a unanimous Court discussed the distinguishing features of a republican form of government:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and

> State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majorities.

Chandler, Enslen and Renstrom, The Constitutional Law Dictionary, Volume I, p. 56 (1985), defines republicanism as:

> Doctrine of government by the people through majority rule . . .

Thus, the essence of a republican form of government is one in which the people choose their rulers and through their rulers pass their own laws through the majoritarian process. The Constitution guarantees to the people this form of government by guaranteeing it to every State in the Union.

Professor Deborah Jones Merritt in her article, The Guarantee Clause and

State Autonomy: Federalism for a Third Century, 88 Columbia Law Review 1 (1988), has extensively and perceptively analyzed the justification for relying upon the Guarantee Clause as a restraint on federal power to interfere with State autonomy. Professor Merritt concludes that "the states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government." Merritt, 88 Columbia Law Review at 2. After discussing the Garcia opinion, Professor Merritt further concludes: "It is preferable to rest determination of federalism issues on a specific constitutional command, such as the guarantee clause, than on notions of political accountability that find no support in the constitutional text." 88 Columbia Law Review at 21,

n. 118. Professor Tribe has similarly suggested using the Guarantee Clause. L. Tribe, American Constitutional Law, (2nd Ed), § 5-23, pp 397-398 (1988). Michigan urges this Court to adopt the analysis in Professor Merritt's comprehensive and thoughtful article and recognize that the Guarantee Clause imposes restraints upon federal power to interfere with State autonomy.

Professor Merritt concludes that the Guarantee Clause has two aspects: "On the one hand, the clause prohibits the states from adopting non-republican forms of government. On the other hand, as long as the states adhere to republican principles the clause forbids the federal government from interfering with state governments in a way that would destroy

their republican character." Merritt, 88 Columbia Law Review at 25. Professor Merritt bases this conclusion on an analysis of both the text of the Guarantee Clause and upon its history. See Merritt, 88 Columbia Law Review at 22-36. She forcefully argues that "the citizens of a state cannot operate a republican government, 'choose[ing] their own officials' and 'enact[ing] their own laws,' if their government is beholden to Washington." Merritt, 88 Columbia Law Review at 25, citing the Federalist No. 39 at 251 (J. Madison) (J. Cooke Ed. 1961). In the context of the 1985 Act, a State cannot enjoy a republican form of government when, in the absence of any other constitutional predicate, the Congress under its Commerce Clause authority usurps the legislative and

executive branches of a State government for its own policies.

This Court's decision in Luther v Borden, 48 US (7 How.) 1 (1849), suggests that a challenge to the 1985 Act based upon the Guarantee Clause is not justiciable. Professor Merritt makes a convincing case that a Guarantee Clause claim based upon allegations of intrusions upon State autonomy is justiciable. Professor Merritt concludes that "neither Supreme Court precedent nor considerations of policy foreclose adjudication of claims that the Federal Government has violated the Guarantee Clause by intruding upon state autonomy." Merritt, 88 Columbia Law Review at 70-71. This Court has recently recognized that the Guarantee Clause imposes limits on judicial review of State action.

> This rule is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders. US Const. Art. IV, § 4; US Const. Amdt. X [further citations omitted]
> Gregory, 115 L Ed 2d at 425.

Michigan contends that Congress should similarly be constrained in the exercise of its Commerce Clause authority in the absence of constitutional predicates justifying intrusion upon State sovereignty.

A majority of this Court has cited a portion of Professor Merritt's article which asserts that the Guarantee Clause directly commands that States have the ability to set qualifications for their government offices by promising the States a republican form of government. Gregory, 115 L Ed 2d at 422. Michigan

now urges this Court to consider the analysis by Professor Merritt in that section of her article entitled "Employing the States as Agents of the Nation" as it relates to the Commerce Clause authority of the United States Congress. Merritt, 88 Columbia Law Review at 60-70.

> Federal attempts to appropriate state governmental resources in this manner deny the states a republican form of government. In a republican government, all power derives from the voters. The citizens in a republican state decide when to exercise their legislative or executive power and how to wield that authority. If the federal government forces the states to adopt a statute, it destroys this relationship between state voters and their representatives: state legislators become accountable to Congress, rather than to their constituents. Similarly, if the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.
> Merritt, 88 Columbia Law Review at 61. (footnote omitted).

Professor Merritt argues that federal attempts to appropriate State governmental resources by compelling States to exercise their legislative or executive authority to implement federal programs destroys the relationship between the State voters and their representatives. She argues that State legislators become accountable to Congress rather than to their constituents, thus denying the States a republican form of government. Merritt, 88 Columbia Law Review at 61. This Court has suggested that this type of compulsion by the federal government over State legislative or executive authorities is constitutionally infirm. While this Court has not explicitly used this Guarantee Clause analysis in evaluating Congressional enactments, the analysis is consistent with the rationale

and result in several decisions. For example, in South Dakota v Dole, 483 US 203 (1987), the Court concluded that Congress' authority under the Spending Clause is not unlimited and is affected by five conditions. South Dakota, 483 US at 207. The fifth recognized limit was that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" (citation omitted). South Dakota, 483 US at 211. In Hodel v Virginia Surface Mining & Reclamation Ass'n, 452 US 264 (1981), this Court stated:

> If a state does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regula-

> tory program. (citations omitted). Hodel, 452 US at 288. (Emphasis added).

The Court concluded that the conditional preemption in Hodel was not so compulsive as to intrude on a State's sovereignty.

In FERC v Mississippi, 456 US 742 (1982), the State of Mississippi challenged the Public Utility Regulatory Policies Act of 1968 (PURPA) which was part of a package of legislation to combat the nationwide energy crisis. Mississippi asserted the requirements in Titles I and III of PURPA that the States consider specified rate-making standards violated its sovereignty. The Court noted that PURPA only required consideration of federal standards and that if a State stopped regulating in the utility field it would not even have to consider

the standards. FERC, 456 US at 764. This Court then held:

> In short, Titles I and III do not involve the compelled exercise of Mississippi's sovereign powers and, equally important, they do not set a mandatory agenda to be considered in all events by state legislative or administrative decision makers. As we read them, Titles I and III simply establish requirements for continued state activity in an otherwise pre-emptible field.
> FERC, 456 US at 769.
> (Emphasis added, footnote omitted).

In South Carolina v Baker, 485 US 505 (1989), South Carolina challenged § 310 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) which removed a federal income tax exemption for bonds issued by States and local governments unless those bonds were issued in a registered form. This meant that for States to continue to offer lower interest rates and remain competitive in the

bond market, they would have to issue registered bonds. The removal of the income tax exemption was part of a statutory program to eliminate tax evasion. Section 310 of TEFRA ". . . covers not only state bonds but also bonds issued by the United States in private corporations." Baker, 485 US at 510. Thus, unlike the 1985 Act, TEFRA was not directed exclusively at the States. In finding § 310 constitutional, the Court stated:

> Because by hypothesis, § 310 effectively prohibits issuing unregistered bonds, it presents the very situation FERC [v Mississippi, 456 US 742 (1982)] distinguished from a commandeering of state regulatory machinery: the extent to which the Tenth Amendment "shields" the states from generally applicable regulations. (citations omitted)
> Baker, 485 US at 514.
> (Emphasis added).

Thus, in Baker, this Court used a similar analysis to FERC and found that there was

not a commandeering of State powers.

Even in Garcia the majority recognized that to the extent left open to them by the Constitution States must be free from this form of compulsion.

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that the citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else--including the judiciary--deem state involvement to be.
> Garcia, 469 US at 546.

The 1985 Act is a statute aimed exclusively at the States, mandating that they carry out and implement a federal policy for LLRW disposal. This mandate inevitably requires States to exercise their legislative and executive powers in order to comply with their disposal

responsibility for all LLRW generated within their respective borders.

By imposing the burden for the disposal of low-level radioactive waste upon the States, the 1985 Act requires Michigan's legislature to pass laws, to utilize the State's credit to provide for the disposal of LLRW, to take title to the LLRW, and to assume all liability arising from the LLRW. This federal edict directly appropriates Michigan's credit, and indirectly that of its citizens, to cover a liability which rightfully belongs to the private proprietary and federal generators of LLRW. It consequently places Michigan's Treasury at an enormous risk without giving Michigan any choice in this decision. It directly compels Michigan to extend its credit in

aid of private entities who no longer need take any responsibility for their waste. This compulsion directly contravenes Michigan's Constitution, Art IX, § 18 which provides:

> Sec. 18. The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this Constitution.

The expenditure of funds and the utilization of its credit by Michigan to implement the federal government's LLRW disposal policy originally set forth in the 1980 Act and made mandatory by the 1985 Act reflects the priorities of Congress rather than the priorities of Michigan citizens and thus works a denial of a republican form of government in violation of the Guarantee Clause. Michigan's executive and legislative

branches have been made the agents of the federal government rather than representatives of the Michigan citizens. By being accountable to the federal government rather than its own citizens the law denies Michigan citizens the popular control exerted in a republican form of government.

The Guarantee Clause is a vital element in the federal structure of the United States. It guarantees that in areas of power reserved to the States the majority will of the people shall prevail. It is part and parcel of the "double security" recognized by Madison. Its protection insures that the "double security" continues to exist. A similar check on power is inherent in the balance of power between the three branches of

the federal government. This Court has been reluctant to allow a deviation from this balance of power as established in the Constitution even where the shift of the power is agreed upon between the parties in question. For example, in INS v Chadha, 469 US 919 (1983), Congress and the President had both consented to a statutory provision authorizing one house of Congress to veto an executive decision. The Court stressed the importance of checking abuses of political power in invalidating this provision. INS, 469 US at 946-951, 959. In the instant case, the Court of Appeals has applied the political process doctrine from the Garcia case in a review of the 1985 Act. When, as in this case, the statute in question significantly shifts the balance of power from the States to Congress,

Michigan urges this Court to conclude that it infringes upon the rights guaranteed to States under the Guarantee Clause. The Court of Appeals' decision in the instant case was based upon a restrictive reading of the opinion in Garcia. It read Garcia as holding that the only protection for state sovereign interests is ". . . by procedural safeguards inherent in the structure of the federal system . . ." 469 US at 552. Michigan contends that Garcia need not and should not be read so restrictively.

CONCLUSION

For the reasons noted in this brief, Michigan urges that the Court declare the 1985 Act, in toto, unconstitutional as a violation of the Guarantee Clause of the United States Constitution, Art IV, § 4.

Respectfully submitted,

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In The

Supreme Court Of The United States

October Term, 1991

THE STATE OF NEW YORK,
Petitioner

v.

THE UNITED STATES OF AMERICA;
JAMES D. WATKINS, as Secretary of Energy;
KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission;
THE UNITED STATES NUCLEAR REGULATORY COMMISSION;
SAMUEL K. SKINNER, as Secretary of Transportation; and
WILLIAM P. BARR, as United States Attorney General,
Respondents

The State of Washington; The State of Nevada; and The State of South Carolina,
Intervenor-Respondents

On Writs of Certiorari to the
U.S. Court of Appeals for the Second Circuit

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITIONER STATE OF NEW YORK

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INTEREST OF THE AMICUS CURIAE

Following Congress' lead "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes . . ." (42 U.S.C. §2013(d)), the U.S. Nuclear Regulatory Commission (NRC) licensed and continues to regulate the radioactive hazard of four nuclear powered generating stations in Connecticut. These nuclear power plants are co-owned by a consortium of private, investor owned utility companies located in different states. They provide electricity on an interstate basis to all of New England.

A by-product of the nuclear generation of electrical energy is nuclear waste – high-level radioactive waste and low-level radioactive waste. The federal government has accepted responsibility for the disposal of high-level radioactive waste and low-level radioactive waste above Class C. Congress, however, through the Low-level Radioactive Waste Policy Amendments Act of 1985 (the "1985 Amendments") has imposed on the States the responsibility for disposing of all Class A, B and C low-level radioactive waste generated within their borders. 42 U.S.C. §2021b *et seq.* The low-level radioactive waste generated by the nuclear power plants located in Connecticut accounts for almost all of the low-level radioactive hazard in this State.[1]

Under the 1985 Amendments, Connecticut is now responsible for the disposal of all Class A, B and C low-level radioactive waste created by the generation of electricity within the State by privately owned utility companies which distribute electricity on an interstate basis. The State is also responsible for the disposal of low-level radioactive waste produced by private radioactive waste generators located in Connecti-

[1] Nuclear generating plants account for 99.9 percent of the low-level radioactive hazard in Connecticut. *Low-Level Radioactive Waste Management in Connecticut – 1990*, Figure 2-1, p. A-11 (1992) Connecticut Hazardous Waste Management Service.

cut and certain low-level radioactive waste created by the federal government.[2]

If Connecticut fails to provide disposal capacity for all of the above-mentioned waste by January 1, 1996, the 1985 Amendments Act requires the State to take title and possession of all low-level radioactive waste generated within Connecticut or assume liability for damages generators incur as a result of the State's failure to dispose of such waste.[3] The States may neither preclude, limit nor regulate the generation of low-level radioactive waste by these private entities.

The 1985 Amendments thus imposed a tremendous economic and political burden on the State of Connecticut forcing it to mobilize all of its sovereign powers to implement the Act's requirements. The State's Legislature has enacted a series of laws to implement the federal low-level radioactive waste mandates.[4] The agencies of the Executive branch have promulgated extensive regulations to enable them to oversee and administer the project.[5] The Connecticut Hazardous Waste Management Service, the State authority charged with siting low-level radioactive waste disposal facilities, has already

[2] The States generate a minimal amount of low-level radioactive waste at state-owned hospitals and universities. For example, the State of Connecticut generated only seven-tenths of one percent of the total volume of low-level radioactive waste generated in the State and only one-thousandth of one percent of the radioactive hazard. *Low-Level Radioactive Waste Management in Connecticut – 1990*, p. A-8, Table 2-5 (1992) Connecticut Hazardous Waste Management Service.

[3] The States of Connecticut and New Jersey are the only two members of the Northeast Compact. With one vote each, Connecticut and New Jersey will host their own facilities in each State.

[4] Conn. Gen. Stat. 22a-134bb, 22a-134ff, 22a-137, 22a-161, 22a-163, 22a-163a-w, 22a-164, 22a-165, and 22a-165a-f.

[5] Regulations of Connecticut State Agencies (proposed) Sections 22a-163f-100 through 22a-163f-107 and 22a-163o-1. See also Regulations of Connecticut State Agencies 22a-163f-1 through f-10, 22a-163l-1 and 22a-163t.

begun the monumental project of complying with Congress' fiat that the States must dispose of low-level waste.[6]

The Attorney General of Connecticut supervises the provision of legal counsel to the Hazardous Waste Management Service on the myriad laws and regulations that are involved in implementing this Act. The judicial system in Connecticut may be required to condemn residential and agricultural land for the facility and will further be strained as the State may be obliged to sue its own citizens – adjacent landowners and citizens' groups – for acts of civil disobedience in order to implement the 1985 Amendments. Challenges to the State's implementation of the federal statute will be heard in State court at State expense.

The siting of low-level waste disposal facilities in Connecticut has already imposed – and will further impose – an enormous burden on the State and its citizens.[7] Each State in the nation is unique with differing topographies, climates, geologic characteristics and population densities.[8] The interplay of the various characteristics in each State may make it ex-

[6] The plans already drawn up by the Connecticut Hazardous Waste Management Service include Site Selection Plan, Comment Response Document to the Draft Site Selection Plan, Draft Public Participation Plan, Draft Site Screening Report, Draft Quality Assurance Plan, Draft Environmental Impact Study Plan, Draft Generic Site Characterization Plan and Low-Level Radioactive Waste Management Updates.

[7] As of December 31, 1991, Connecticut had expended $6,200,000 on the first stages of administering the low-level radioactive waste responsibilities mandated by the 1985 Amendments – selecting a series of possible sites for further testing.

[8] Connecticut is the second most densely populated State in the nation. Three Connecticut towns were identified in June of 1991 by the Hazardous Waste Management Service as potential sites for Connecticut's low-level radioactive waste disposal facility. Forty-three thousand, three hundred and sixty-eight people live in those towns (*Connecticut State Register and Manual*, 1991, Connecticut Secretary of State). The towns selected as possible sites contain some of the only remaining prime farm land in those areas.

tremely difficult, if not impossible, for a particular State to choose a suitable disposal site. Many homeowners in areas which are designated as disposal sites will not be able to sell their homes. Buyers will be unwilling to locate in proximity of potential low-level radioactive waste disposal sites or will be unable to obtain financing from reluctant lending institutions. Affected citizens will have no ability to appeal to their State government, as Congress has pre-empted all State regulatory power while compelling the State itself to provide for disposal of low-level radioactive waste.

The State of Connecticut is only one of at least fourteen States that may be forced to host a facility.[9] Despite the tremendous amount of State resources and revenues expended to comply with the 1985 Amendments, the State's ability to construct and operate a safe disposal site on a timely basis is still uncertain.[10] If a disposal site is not in operation in Connecticut by January 1, 1996, the 1985 Amendments will force the State to "take title" and possession to all the Class A, B and C low-level radioactive waste generated by privately owned utility companies and other entities.

This brief is being filed on behalf of the State of Connecticut by its Attorney General and consent to its filing is not required. U.S. Sup. Ct. R. 37.5.

[9] *Nuclear Waste – Slow Progress Developing Low-Level Radioactive Waste Disposal Facilities*, p. 12 (January 1992), U.S. General Accounting Office, Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO/RCED-92-61.

[10] The State of Connecticut has already failed to file a complete application with the United States Nuclear Regulatory Commission by January 1, 1992, as required by 42 U.S.C. 2021e(e)(1)(D). This failure subjects generators in the State of Connecticut to the triple surcharge penalty contained in 42 U.S.C. 2021e(e)(2)(D). Those costs will be reflected in the costs of goods which must ultimately be borne by the consumers in the State of Connecticut and elsewhere.

SUMMARY OF ARGUMENT

In 1985, Congress decided to punish those States that were unable to comply with the directives of the Low-Level Radioactive Policy Amendments Act of 1985. Although the States are entirely pre-empted from regulating the generation of low-level radioactive waste by private entities, the 1985 Amendments compel the States to provide for the disposal of all such waste by January 1, 1996 or to take title and possession of the waste and be liable for any damages resulting from that waste. This statute reflects a unique and terribly burdensome encroachment on State sovereignty not envisioned by the framers of the Constitution.

This Court has recognized that there are some "affirmative limits that the constitutional structure might impose on federal action affecting the States," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985). Such limitations are particularly likely where Congress seeks to coerce or compel State regulatory activity rather than extend federal regulation to States. Nevertheless, relying on this Court's decision in *Garcia* for the proposition that State sovereignty is protected by the federal political process itself, the Court of Appeals for the Second Circuit upheld the Low-Level Radioactive Waste Policy Amendments Act of 1985.

This case represents a significant extension of *Garcia* and subsequent Tenth Amendment cases for several reasons.

- Rather than imposing federal regulation on state activities, in an area which may or may not be a "traditional" governmental function, *Garcia*, *supra*, 469 U.S. at 547, Congress here has compelled the State itself to enter the field of disposal of low-level radioactive waste, with draconian consequences if it fails to do so.

- Congress here did not merely extend to State or local governmental entities the same federal requirements that are imposed on private entities, nor did it merely

compel States to impose federal standards or requirements on private businesses. Rather, in the 1985 Amendments, Congress imposed a unique and onerous burden, not on the private or public entities that generate nuclear waste, but on the States themselves.

- A critical element of the statutes upheld in *Garcia* and other cases against Tenth Amendment challenges is notably absent from the 1985 Amendments. In previous federal programs reviewed by this Court, the States retained the ultimate choice to refrain from regulatory responsibilities in an area involving federal regulation or from participation in federal programs. While the choice of not participating in an important federal program may have been an undesirable one for the States, the choice was possible nonetheless. Under the 1985 Amendments, no State can choose to remove itself from the field of low-level radioactive waste. It can neither regulate nor prohibit production of such waste within its borders. It is simply required, by Congressional fiat, to provide for disposal of all Class A, B and C low-level waste produced by private generators and some federal entities or take title to and possession of that waste.

In *Garcia*, the Court concluded that State participation in the federal political process would "ensure that laws that unduly burden the states will not be promulgated." 469 U.S. at 556. However, this is a case in which the federal political process plainly did not protect State sovereignty in the manner envisioned by this Court. Far from being a "paragon[] of legislative success, promoting state and federal comity," *State of New York v. United States*, 942 F.2d 114, 119 (2nd Cir. 1991), here Congress itself opted out of an extremely difficult political and economic problem and imposed it on the States. Having promoted nuclear power through federal policies and having displaced the States from regulating in this field, Congress squarely placed the burden of disposing of this waste on the States themselves, notwithstanding the enormous political and economic consequences for the States and their

localities. If the federal political process is sufficient to satisfy the Tenth Amendment in this case, then the Constitution places no limits on the draconian actions which Congress may wish to take against the States.

ARGUMENT

I. THE 1985 AMENDMENTS EXCEED THE AFFIRMATIVE LIMITS WHICH THE CONSTITUTION IMPOSES ON CONGRESSIONAL ACTION AFFECTING THE STATES.

In 1985, Congress decided to punish those States that were unable to comply with the directives of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021b, *et seq.* (the 1985 Amendments). If by January 2, 1996, a State were unable to provide for the disposal of all the low-level radioactive waste generated within its borders, Congress has directed that the ownership of the radioactive waste generated by private entities and some federal facilities would transfer from the waste generators to the State itself. 42 U.S.C. §2021e(d)(2)(c). Upon completion of the compelled transfer of ownership to the State, the State would then either be required to take possession of the radioactive waste or pay damages to those entities that created the waste in the first instance.

This directive, known as the "take title" provision, is unique in American law. Never before has Congress so completely disregarded State sovereignty, subjugating the States, their residents, their treasuries and their sovereign governments to the service of private interests and federal regulatory goals.

Despite the unique and compulsory nature of the 1985 Amendments, the Second Circuit Court of Appeals in *State of New York v. United States*, 942 F.2d 114 (2nd Cir. 1991), determined that the "take title" provision "does not undermine the constitutional structure" nor "does it violate principles of federalism . . ." *Id.* at 121.

The Court based its decision on its determination that the 1985 Amendments were enacted "only after robust debate and a clearly articulated acceptance of NGA [National Governors' Association] and other state-based recommendations." *State of New York v. United States, Id.*, at 120. Relying on this Court's decisions in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and *South Carolina v. Baker*, 485 U.S. 505 (1988), for the proposition that State sovereignty is protected by the national political process, the Court of Appeals concluded that the 1985 Amendments did not violate the constitution. *New York v. United States, supra*, 942 F.2d at 121.

The Court's decision seriously minimizes the constitutional implications of the "take title" provision and fails to consider this provision's destructive effect on State sovereignty. The Court's conclusions are a direct result of an overly strict interpretation of the standard of review of Congressional Commerce Clause power set forth by this Court in *Garcia* and *Baker*.

A. This Court's Tenth Amendment Decisions Have Preserved Certain Affirmative Limits to Congressional Power Under the Commerce Clause.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court reviewed the application of the minimum wage and overtime requirements of the Fair Labor Standards Act to a public mass-transit authority. Dismissing as unsound and unworkable the "traditional governmental function" standard for review of federal actions under the Tenth Amendment developed in *National League of Cities v. Usery*, 426 U.S. 833, (1976) the Court determined that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552.

Although *Garcia* ended the judicial search for "*a priori* definitions" or "objective criteria for 'fundamental' elements of state sovereignty . . ." in Tenth Amendment challenges, this Court did not renounce the existence of all substantive restraints on Congressional Commerce Clause power: "Of course, we continue to recognize that the states occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 548, 556. However, the particular "factual setting" in *Garcia* demonstrated that "the internal safeguards of the political process have performed as intended" and this Court was not required "to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the states under the Commerce Clause." *Id.* at 556.

In *South Carolina v. Baker*, 485 U.S. 505 (1988), this Court further developed the Tenth Amendment analysis articulated in *Garcia*. *Baker* tested the constitutionality of a change in the Internal Revenue Code removing the federal income tax exemption for interest earned on unregistered long-term bonds issued by private corporations, the United States and State and local governments. The change in the law was intended by Congress to reduce the tax evasion attributable to bearer bonds and the removal of the income tax exemption effectively precluded South Carolina from issuing those bonds. South Carolina filed an original action in this Court claiming that the Tax Code changes violated the Tenth Amendment. South Carolina based its Tenth Amendment claim on its assertion that "the political process failed . . . because Congress had no concrete evidence" to support the new tax legislation and the new law, as a remedy for tax evasion, was "ineffective". *Id.* at 512. This Court rejected that argument: "[N]othing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation . . . Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Id.* at 513.

Although South Carolina's specific claims were rejected, this Court again noted that "constitutional limitations" on Congressional power "independent of those discussed in *Garcia*" still exist. *Id.* at 513. In this regard, the Court focused its concern on Congressional action which commandeered state regulatory machinery "to compel state regulatory activity" or "to control or influence the manner in which states regulate private parties". *Id.* at 514. After reviewing the tax statute under the principles discussed in *FERC v. Mississippi*, 456 U.S. 742 (1982), the Court determined that the change in the Tax Code did not commandeer the governmental machinery of South Carolina. Instead, the statute merely regulated state activity as part of a generally applicable federal regulatory scheme:

> Any federal regulation demands compliance. That a state wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Id. at 514-515.

In *Garcia*, therefore, this Court specifically noted, without identifying or defining them, the possibilities of "affirmative limits" that "the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Garcia, supra* 469 U.S. at 556. Again in *South Carolina v. Baker*, 485 U.S. 505, 513 (1988), this Court "left open the possibility" that there exist "constitutional limitations" on Congress' power over the States independent of the national political process. Such limitations are particularly likely where Congress seeks to coerce or compel particular state regulatory activity rather than extend existing federal regulation to States.

B. The Coercive Nature of the 1985 Amendments Destroys the Dignity and Sovereign Power of the States and Exceeds the Affirmative Limits on Congressional Action Preserved in *Garcia* and *Baker*.

This Court has often approved Congressional legislation which directly affected State activities and operations. Legislation applying a generally applicable regulatory scheme to State activities was approved in *Garcia* and *Baker*. Federal statutes that induced States to regulate private entities in a manner which would further federal regulatory goals were sustained in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) and *FERC v. Mississippi*, 456 U.S. 742 (1982).[11] The 1985 Amendments, however, differ fundamentally from any of the federal regulatory schemes affecting State interests previously reviewed and approved by this Court. Indeed, the onerous "take title" provision is a unique form of coercion directed exclusively at the States as sovereign entities.

Unlike the Fair Labor Standards Act discussed in *Garcia*, or the Tax Equity and Fiscal Responsibility Act of 1982

[11] In *Hodel* this Court reviewed provisions of the Surface Mining Control and Reclamation Act prescribing performance standards for surface coal mining on steep slopes. Under the Act, if a State did not enact laws implementing federal environmental standards, the Secretary of the Interior would administer the Act's regulatory program for the State. The Court rejected a Tenth Amendment challenge to the Act because the federal requirements governed only the activities of private coal mine operators and the States were free to refrain from participating in the federal regulatory program. 452 U.S. at 283-294.

FERC v. Mississippi considered a Tenth Amendment challenge to provisions of the Public Utility Regulatory Policies Act (PURPA) which required the States to consider specified utility ratemaking standards and imposed certain procedures on State regulatory commissions. In upholding the federal statutes the Court concluded that the States were free to abandon the utility regulatory field and, thus, were not compelled to consider the federal standards or follow the federal procedures set forth in the Act. Congress, through PURPA, simply established "requirements for continued state activity in an otherwise pre-emptible field." 456 U.S. at 769.

examined in *Baker*, the 1985 Amendments do not simply extend a generally applicable federal regulatory scheme to state activities. Under the 1985 Amendments there is no regulatory scheme which applies to private sector corporations, the federal government and the States for the disposal of low-level radioactive waste – the disposal obligation is imposed *only* on States.[12]

Nor is this an instance where Congress has sought to "influence" state regulation of private entities, as did the statutes approved in *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., supra*, and *FERC v. Mississippi, supra*. Instead, the 1985 Amendments compel the States to themselves commence disposing of low-level radioactive waste by January 1, 1996 and, if they do not, to assume the ownership and financial responsibility for the waste generated by private corporations and the federal government.

Unlike the federal statutes reviewed by this Court in *Hodel, FERC v. Mississippi, Garcia*, and *Baker*, the 1985 Amendments reflect Congressional action in a totally new and different direction – compelling State action in a field the States have not previously entered and in which private entities are not subject to the same Congressional compulsion. The 1985 Amendments do more than commandeer "the legislative process of the states by directly compelling them to enact and enforce a regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., supra*, 452 U.S. at 288. Through the take-title provision, Congress has commandeered the States themselves, subjugating the States, their machinery of government and their treasuries to private waste generators.[13]

This Court has never sanctioned the "compelled exercise" of a State's "sovereign powers." *FERC v. Mississippi, supra*, 456 U.S. at 769.[14] To the contrary, this Court has recognized choice as an essential element of State sovereignty.

[12] The Court of Appeals' statement in *State of New York v. United States* that the type of transfer of nuclear waste ownership mandated by the 1985 Amendments is "not uncommon" has no basis in fact. The take-title provision has no relation to the transfers of title to nuclear waste "usually effected by contract". 942 F.2d at 120. The Court's misplaced reliance on *General Elec. Uranium Corp. v. United States Dep't. of Energy*, 764 F.2d 896 (D.C. Cir. 1985) and *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F.Supp. 850 (N.D. Ill. 1990) reflects its confusion between the voluntary contractual arrangements discussed in those cases and the compelled transfer of title by Congressional edict contained in the 1985 Amendments.

The Court in *General Elec. Uranium*, 764 F.2d at 898, specifically noted the voluntary nature of the contractual arrangements authorized under Section 302 of the Nuclear Waste Policy Act. Likewise, the transfer discussed in *Commonwealth Edison*, 731 F.Supp. at 856, was a purely voluntary business arrangement: "It [Allied-General Nuclear Services] further promised, in the latter event (that is, activation of the Facility Contingency Plan), to take title to the spent nuclear fuel that Edison tendered for reprocessing."

The State of Connecticut has not volunteered to acquire, possess and dispose or pay for the low-level radioactive waste generated within its borders by private corporations and the federal government.

[13] The 1985 Amendments' requirement that States own and possess radioactive waste is also far more intrusive on State dignity and power than the EPA's Clean Air Act regulations reviewed by three Courts of Appeal in *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), vacated and remanded *sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 521 F.2d 837 (9th Cir. 1975), vacated and remanded, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA v. Brown*, 431 U.S. 99 (1977). In those cases, the regulations authorized the EPA Administrator, in the event a State failed to submit an adequate air pollution control plan, to develop a detailed federal plan and compel States to implement it by enacting legislation and appropriating funds. The three courts of appeals declined to construe the Act as allowing EPA to compel State implementation of federal plans because of the serious constitutional questions which the regulations raised. *See Maryland v. EPA*, 530 F.2d at 228; *District of Columbia v. Train*, 521 F.2d at 983-987; *Brown v. EPA*, 521 F.2d at 832-837.

[14] Under the Spending Clause, Congress may "attain broad policy objectives not thought to be within Article I's 'enumerated legislative fields', . . . through the use of . . . the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) quoting *United States v. Butler*, 297 U.S. 1, 65 (1936). Nevertheless, this Court has noted that constitutional limitations exist on Congress' use of financial inducements which compel State action:

(continued)

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else – including the judiciary – deems State involvement to be.

Garcia, supra, 469 U.S. at 546.

State choice necessarily entails the converse of the above statement – the freedom to choose not to engage in an activity. This Court has repeatedly upheld federal statutes that affected State interests, in part because they maintained the States' freedom to refrain from the activity in which Congress authorized State participation.[15] No State, however, can withdraw from or alter either the federally regulated production of nuclear power within its borders or the low-level radioactive waste disposal program imposed by Congress.

For many years Congress encouraged the development of nuclear power as a means of securing a safe, dependable, domestic source of electrical generation. *Vermont Yankee Nuclear Power v. Natural Resources Defense Council,* 435 U.S. 519, 557 (1978). Today, Connecticut is host to four nuclear powered electrical generating stations, co-owned by a consortium of utility companies located in different states and providing electricity on an interstate transmission grid to all of New England. The nuclear power plants account for virtually all of the low-level radioactive hazard created in this State.[16] The State may neither preclude nor regulate the generation of low-level radioactive waste at these privately owned nuclear power plants. 42 U.S.C. §2021(c).[17]

The inability of a State to prohibit or limit generation of low-level radioactive waste – the source of the underlying problem – accentuates the inequity of thrusting title, possession, liability and responsibility for disposal upon the States. This inequity is compounded by the fact that Congress also required the States to be responsible for disposal of and liable for, certain low-level radioactive waste generated by the agencies of the Federal Government (42 U.S.C. §2021c(2)(1)(B)).

The 1985 Amendments, therefore, leave the States with no real choices. The States cannot withdraw from the field. They cannot restrict the generation of low-level radioactive

[14] *(continued)*
Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." *Steward Machine Co. v. Davis, supra,* 301 U.S., at 590, 57 S.Ct., at 892. *South Dakota v. Dole, supra,* 483 U.S. 211 (1987).
If coercive legislation under the Spending Clause is subject to limitations, coercive legislation formulated under the guise of commerce regulation is prohibited: "constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *South Dakota v. Dole, Id.* at 209.

[15] *See Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act allows States to refrain from regulatory responsibilities in favor of federal regulatory agency); *Federal Energy Regulatory Com'n. v. Mississippi,* 456 U.S. 742 (1982) (States may decline to accept conditions imposed by Public Utilities Regulatory Policies Act by abandoning regulation of the field); *United Transportation Union v. Long Island R. Co.,* 455 U.S. 678 (1982) (States can avoid application of the Railway Labor Act by declining ownership of an interstate railway); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 581 (1985) (State can avoid application of the Fair Labor Standards Act by not requiring State employees to work overtime); *South Carolina v. Baker,* 485 U.S. 505 (1988) (States may avoid issuing registered bonds under Tax Equity Fiscal Responsibility Act by foregoing favorable tax treatment afforded registered bonds).

[16] For example, in Connecticut 99.9 percent of the low-level radioactive hazard is produced by nuclear generating stations. *Low-level Radioactive Waste Management in Connecticut – 1990,* (1992) Connecticut Hazardous Waste Management Service.

[17] "Paragraph (3) emphasizes the continued Federal preemption of authority to regulate Atomic Energy Act materials for radiological health and safety." Senate Energy and Natural Resources Committee, Low-Level Radioactive Waste Policy Amendments Act of 1985, S.Rep. No. 199, 99th Cong., 1st Sess. p. 9 (1985).

waste and, even if they are not in the waste disposal business, they must start disposing of such waste before January 1, 1996. If a State waste disposal facility is not in place by that date the State, by Congressional edict, will own and possess that waste. The forced acquisition of title by the States to privately generated low-level radioactive waste is no less an anathema to State sovereignty than a directive by Congress that States relocate their seats of government if a low-level radioactive waste disposal site is not chosen by January 1, 1996. That Congress would have such powers under the Constitution "would not be for a moment entertained" by this Court. *Coyle v. Smith*, 221 U.S. 559, 565 (1911).

Hence, the 1985 Amendments direct and compel State action in a manner never before approved – or even considered – by this Court. If the 1985 Amendments do not violate the Tenth Amendment then, contrary to this Court's careful statements in *Garcia*, there are no affirmative limits to Congressional power under the Commerce Clause. If the 1985 Amendments are allowed to stand, similar coercive mandates could be employed by Congress in other areas: States could be required to assume the bad loans or financial losses of failing banks located within their States or to own and possess all hazardous or toxic waste generated by private companies operating within a State's borders. This Court in *Garcia* never intended to sanction the destruction of State sovereign interests; on the contrary, it made clear that some structural Tenth Amendment limits remain – limits that the 1985 Amendments far exceed.

II. THE NATIONAL POLITICAL PROCESS FAILED TO PROTECT THE STATES FROM UNDULY BURDENSOME FEDERAL REGULATION, AS ASSUMED BY THIS COURT IN *GARCIA*.

In *Garcia*, this Court determined that the States must look to the "procedural safeguards inherent in the structure of the federal system" for protection against impairment of

their sovereign interests. *Garcia, supra*, 469 U.S. at 552. According to this Court, "[t]he political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556. Of course, the Court recognized that the national political process did not provide a 100 percent guarantee against unconstitutional Congressional action – "failings in the national political process" were "possible." *Id.* at 554. The Court, however, was not prepared to "identify and define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause" (*Id.* at 556) by "conjuring up horrible possibilities that never happen in the real world." *Id.* at 556, quoting *New York v. United States*, 326 U.S. 572, 583 (1946).

In reviewing the 1985 Amendments, the Court of Appeals adopted a totally inflexible Tenth Amendment analysis and determined that under *Garcia*, the Constitution was necessarily satisfied because the federal political process carried the 1985 Amendments through Congressional debate and vote to their final enactment into public law: "The political process ensures that laws that unduly burden the states will not be promulgated. *Garcia*, 469 U.S. at 556." *State of New York v. United States, supra*, 942 F.2d at 120. Despite the unique nature of the take title provision, the Court of Appeals did not inquire – as this Court itself did in *South Carolina v. Baker* – whether Congress crossed the line, however fine it may be, that separates the proper exercise of Commerce Clause power from unconstitutional intrusion on State sovereignty.

In its decision, the Court of Appeals reviewed the history of the 1985 Amendments and accurately noted that in both the Low-Level Radioactive Waste Policy Act of 1980 and the 1985 Amendments "Congress acted only after robust debate and a clearly articulated acceptance of NGA [National Governor's Association] and other state-based recommendations." *State of New York v. United States, supra* 942 F.2d 120. However, when viewed in historical context, the legislative process was far from a "paragon" of constitutional "success." *Id.* at 119. Instead, although the States' interests were consid-

ered and many of the States' suggestions adopted, in the final analysis Congress acted in a manner which it knew was punitive to the States[18] and constituted an unprecedented assault on State dignity and power.[19]

The history of Congress' action on the disposal of low-level radioactive waste demonstrates that the political process did not protect States' sovereign interests in the manner contemplated by *Garcia*. It was Congressional action which encouraged the development of nuclear power and the proliferation of nuclear generating stations in this country. *Vermont Yankee Nuclear Power Company v. Natural Resources Defense Council*, 435 U.S. 519 (1978). "There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." *Pacific Gas & Electric v. State Energy Resources Commission*, 461 U.S. 190, 221 (1983). The federal government has also assumed authority "through its power to regulate interstate commerce and provide for the national defense and general welfare" over "the use of nuclear energy." *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981).

Low-level and high-level radioactive wastes are by-products of nuclear energy and Congress correctly perceived

[18] "It is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that." 131 Cong. Rec. S.18113 (daily ed. Dec. 19, 1985) (statement of Senator Johnston).

[19] "Certainly, the Congress, as is each State, is free to exercise its powers to designate sites and to construct and operate low-level waste disposal facilities. But for Congress to mandate that the States must undertake the burden of providing waste facilities without any provision for federal funding or face obligations, liabilities, or other sanctions imposed under federal law may raise Tenth Amendment problems. There does not appear to be pertinent judicial precedent that has upheld in the face of Tenth Amendment objections a federal mandate as intrusive on State sovereignty as the one at issue here." *Constitutional Issues Raised By the Imposition of Liabilities on the States Under a Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980*, p. 5, Congressional Research Service, Report to the House Committee on Energy and Commerce, Subcommittee on Energy Conservation and Power dated December 16, 1985.

the disposal of such waste to be a federal problem. *See Pacific Gas & Electric v. State Energy Resources Commission, supra.* In 1980 legislative steps were taken to deal with the issue of low-level radioactive waste. However, when the 1980 legislation did not work in the way it was intended, Congress – with time running out – took an additional, unprecedented step to coerce the States into solving the national low-level radioactive waste disposal problem. The national problem became a State responsibility. 42 U.S.C. §2021c(a)(1).

None of the early drafts of the 1985 Amendments Act, subject to months of review and hearings, contained the take-title provision[20] On Tuesday, December 17, 1985, in the closing days of the session before Christmas recess, Senator Thurmond provided Congress with the take-title provision in the form of a "Dear Colleague" letter. Senators Thurmond and Johnston then formally proposed on Thursday, December 19, 1985, an amendment containing the take-title provision to the bills being considered by the House and Senate.[21] With no new facilities constructed and threatened with the closure of the three existing disposal sites, the 1985 Amendments Act – with the take-title provision – passed both Houses of Congress on December 19, 1985.[22]

[20] The legislative history of the 1985 Amendments indicates that "[N]o Senate Report was submitted with this legislation." Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 1985 U.S. Code Cong. & Admin. News (99 Stat.) 2974, 2975. In fact, it does not appear that any of the House reports accompanying H.R. 1083 (the House Bill which initiated the legislative process on the 1985 Amendments) or related House or Senate reports discussed the take title provision.

[21] [T]oday, I am offering a complete substitute to H.R. 1083, the Low-level Radioactive Waste Policy Amendments Act of 1985 . . . The substitute that is offered today is similar to the one that I circulated earlier this week with a Dear Colleague letter . . . This substitute is strongly supported by the Governors of the sited States – South Carolina, Washington and Nevada. 131 Cong. Rec. S.18,105-6 (daily ed. Dec . 19, 1985) (statement of Senator Thurmond).

[22] ". . . [G]iven the lack of time to adequately flush out the weaknesses inherent in this package, and given the sited-State Governors' unconditional

(continued)

In approving the "take title" provision, Congress ignored "the special and specific position in our constitutional system" occupied by the States, transforming the States into agents of the federal government and private nuclear waste generators. The internal safeguards of the political process envisioned by the Constitution to protect State sovereignty did not work. *Garcia, supra* 469 U.S. at 556. Instead, in this instance, the federal political process was specifically employed to shift directly to the States a federal responsibility in a difficult political and regulatory area. One of the "horrible possibilities that never happen in the real world," happened here. *New York v. United States*, 326 U.S. 572, 583 (1946) (quoted in *Garcia*, 469 U.S. at 556).

The process-based protections relied on by this Court in *Garcia* failed because the "[m]embers of Congress . . . elected from the various States" voted, not as representatives of the States, but as "Members of the Federal Government." *Garcia*, 469 U.S. at 564-565 (Powell, J. dissenting).

> One can hardly imagine this court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights . . .

Garcia, 469 U.S. at 565 n. 8 (Powell, J., dissenting).[23]

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[22] *(continued)*
endorsement for such an approach, we have no choice but to move this legislation forward at this time." Cong. Rec. S.18,114 (daily ed. Dec. 19, 1985) (statement of Senator McClure).

[23] Realizing the draconian nature of the take title provision, Congress neither imposed a take title provision nor any time frames upon Federal agencies required to develop disposal capacity (42 U.S.C. §2021c(b). The United States Department of Energy estimates that disposal capacity for low-level radioactive waste for which it is responsible shall not be available until *(continued)*

Responsibility for disposal of low-level radioactive waste entails not only political and legal liability but also horrendous economic burdens. The search for an appropriate site for a waste disposal facility, the testing of potential sites, the displacement of homeowners, farmers, and parkland, and the construction of a proper and safe facility is an enormously complicated, expensive, technologically difficult and politically explosive process. Imposition of that responsibility on the States requires the States' government to exercise judicial, executive and legislative powers to fulfill federal policies, encroaching on the limits of proper political responsibility and shielding Congressional policy makers from accountability for unpopular decisions. *See* Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L.Rev. 1 (1988). While the States sought to participate in the solution to the low-level radioactive waste disposal problem throughout the development of the 1980 and 1985 legislation, the States did not agree to subjugate themselves, their residents or their treasuries to a process for resolving a major national problem that sanctioned Congress' evasion of responsibility.

The federal political process, through the coercive nature of the 1985 Amendments, upset the federal-state relationship established by the Constitution.

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the states and the federal government was adopted by the Framers to ensure the protection of 'our fun-

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[23] *(continued)*
the year 2010. *Report to Congress in Response to Public Law 99-240, 1988 Annual Report on Low-Level Radioactive Waste Management Progress*, Section 4.4.5, p. 172, U.S. Department of Energy (1989); See also *Nuclear Waste — Slow Progress Developing Low-Level Radioactive Waste Disposal Facilities*, p. 25 (January 1992), U.S. General Accounting Office, Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO/RCED-92-61.

damental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985) quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting).

Gregory v. Ashcroft, 111 S.Ct. 2395, 2399 (1991).

As this Court recently reiterated in *Gregory v. Ashcroft*, *supra*, 222 S.Ct. at 2399, one of the fundamental principles of government is the Constitutional establishment of "... a system of dual sovereignty between the states and the federal government." The dual system of sovereigns embodied in the Constitution reflected the framers' distrust of an omnipotent, federal government.

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. The *Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison).

The 1985 Amendments are inconsistent with the constitutional balance of powers between the States and the federal government. The coercive imposition on the States of congressional policies that entail political and economic liabilities threatens the fundamental concept of separate sovereign entities coexisting under a constitutional framework. The 1985 Amendments are destructive of State sovereignty and are the result of the national political process failing to protect the

"States as States". *Garcia's* strict standard for review of claimed Tenth Amendment violations must be "tailored" in this case "to compensate" for Congress' failure to respect State sovereignty.

CONCLUSION

The 1985 Amendments should be declared unconstitutional.

Respectfully submitted,

STATE OF CONNECTICUT,
AMICUS CURIAE IN SUPPORT
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Nos. 91-543, 91-558, 91-563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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THE COUNTY OF CORTLAND,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*
Respondents,

and

THE STATE OF WASHINGTON; THE STATE OF NEVADA;
and THE STATE OF SOUTH CAROLINA,
Intervenors-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE COUNCIL OF STATE GOVERNMENTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF FOR THE COUNCIL OF STATE GOVERNMENTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the rules of this Court, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioners. All petitioners and respondent have consented to the filing of this brief. This motion is made necessary by the failure of intervenors-respondents' counsel to provide consent.

Amicus, the Council of State Governments (CSG), is an organization whose members include all fifty state

governments and numerous elected and appointed officials throughout the United States. It and its members have a compelling interest in legal issues that affect state and local governments, particularly issues relating to constitutional protection afforded the states vis-a-vis the federal government.

For the foregoing reasons, *amicus* respectfully requests that it be allowed to participate in this case and file the annexed brief *amicus curiae*. *Amicus* is in a unique position to aid the Court in its consideration of the issues presented. The interests of *amicus* are direct and substantial. Its participation will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear on this case.

Accordingly, *amicus* CSG, by and through its undersigned counsel, respectfully requests that its motion for leave to file an *amicus curiae* brief in support of petitioners be granted.

Respectfully submitted,

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February 14, 1992

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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE COUNCIL OF STATE GOVERNMENTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus is an organization whose members include all fifty state governments and numerous elected and appointed officials throughout the United States. It and its members have a compelling interest in legal issues that affect state and local governments, particularly issues relating to the constitutional protection afforded the states vis-a-vis the federal government.

STATEMENT

Stripped to its essence, the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("the 1985 Act") requires New York to create within its borders a low-level radioactive waste disposal site, and to do so no later than January 1, 1996. This command is enforced by the threat of involuntary and open-ended liability for all such waste located or generated in the state from that day forward.

The law sets a number of interim deadlines for meeting Congress's command:

- January 1, 1988, for completing a site plan and a development schedule for the site. 42 U.S.C. § 2021e(e)(1) (1988).
- January 1, 1990, for either submitting a license application for a proposed disposal site to the U.S. Nuclear Regulatory Commission or completing a detailed plan for achieving the necessary disposal capacity. *Id.*
- January 1, 1992, for completion of all license applications. *Id.*

Each of these deadlines is enforced by financial incentives. *Id.* § 2021e(e)(2). Surcharges up to $40 a cubic foot are imposed on the waste that New York exports to disposal sites in other states. New York receives a rebate of 25% of these surcharges, but only if and when it meets each deadline. *Id.* § 2021e(d). If it misses a deadline, it not only loses the rebate income, but any waste that it or its citizens export may be charged as much as four times the normal surcharge.

A separate provision sets January 1, 1993, as the deadline for New York, along with other states, to provide for disposal of all low-level waste generated within its borders. States that miss this deadline receive no further surcharge rebates unless they take title to the waste. *Id.* § 2021e(d)(2)(C). In addition, other states

are authorized to refuse to accept waste from New York on this date. *Id.* § 2021e(e)(2)(C).

Finally, on January 1, 1996, if no disposal site is operating in New York, the 1985 Act forces the state to take title to all low-level radioactive waste within its borders. *Id.* § 2021e(d)(2)(C). What is more, any waste generator in the state may demand that the state take actual possession of the waste. If New York does not do so immediately, the state is "liable for all damages directly or indirectly incurred" as a result. *Id.*

The deadlines and the "take title" provision of the 1985 Act operate together to bend the state to Congress's will. Even if New York is willing to give up the rebates Congress has offered and to risk the reprisals from other states that Congress has authorized, the "take title" provision ensures that it cannot long resist the federal command.

On January 1, 1996, if New York still refuses to exercise governmental authority over low-level radioactive waste, it will become the owner of the waste. Then what New York chooses not to do as a government it will be forced to do as an owner.

Nor is this a distant prospect. Because the regulatory process is a lengthy one, New York cannot delay compliance with Congress's command until the 1996 deadline is imminent. If the "take title" provision is enforceable, New York must take steps now to conform to Congress's directive.

SUMMARY OF ARGUMENT

The Framers believed that liberty was best preserved by dividing the responsibilities of power among many jealous rivals—executive and legislative, state and federal. To protect the role of states as laboratories of social change and challengers of national orthodoxy, the Framers gave the federal government powers that were

"few and defined," a safeguard reemphasized in the bill of rights, whose tenth amendment reserved for the states and the people all powers not delegated to the new central government.

Among the delegated powers was authority "to regulate Commerce . . . among the several States." As the nation grew, so did this power. Today, no one would challenge Congress's authority to regulate all commerce in radioactive waste, even to the point of preempting the field. But in the 1985 Act Congress chose to regulate not commerce but the states themselves. It singled out state governments for commands that could only be directed to governments. If the combination of the commerce clause and the tenth amendment mean anything, it is that Congress's power to regulate commerce does not include the power to regulate the states in this fashion.

For two hundred years, it has been the understanding of all—Congress, President, and courts—that such commands could not be issued to the states. As recently as 1977, the United States refused even to defend federal regulations that tried to issue commands to the states. *EPA v. Brown*, 431 U.S. 99 (1977). And this Court strained mightily as recently as 1982 to construe apparent Congressional mandates as mere exhortations and guarantees of equality for federal claims in state fora. *FERC v. Mississippi*, 456 U.S. 742 (1982).

There is no reason to take a different view today. Congress's authority to address commands directly to the states was not at issue in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988). Those cases addressed the more vexing question of when states must be exempted from laws that apply to private parties and even to the federal government itself. Before *Garcia*, the Court encountered difficulties in deciding which governmental functions were so traditional and integral that they deserved exemption from general federal laws. These

difficulties do not arise when Congress tries to regulate the states alone. Such regulation almost by definition is regulation not of commerce but of the states' governmental activities.

Nor can there be any claim that the political safeguards invoked in *Garcia* and *Baker* will protect the states from such mandates. Federal politicians will not long resist the opportunity to pass laws that let them keep the credit and delegate the blame. As this case shows. The Congressmen who passed the 1985 Act and took credit for solving the radioactive waste problem were nowhere to be seen when the time came to decide who would pay the price. Laws that blur accountability in this fashion are not just bad government. They undercut the assumption of the Framers that the states would remain independent centers of power accountable directly to the people.

The United States' suggestion that this is a case for balancing only demonstrates the wisdom of a flat prohibition on federal commands aimed at the states. There is no federal interest in solving the waste problem by forcing states to regulate it. Congress can solve it overnight by issuing statutory regulations in its own name. Nor are the states' interests in sovereignty accommodated by leaving them some discretion to shape the details. What matters is the leash, not its length.

Finally, the "take title" provision cannot be used as an "incentive" like federal grants, *see South Dakota v. Dole*, 483 U.S. 203 (1987), or the threat of federal preemption. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). In the first place, the 1985 Act gives the states no choice. Whether as owner or as government, they must provide for the disposal of all the radioactive waste within their borders. And in the second place, unlike the grants and threats of preemption approved in other cases, this provision itself exceeds Congress's authority. The commerce clause

simply does not authorize Congress to aim punitive measures at the states in order to enforce federal commands.

ARGUMENT

I. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO ISSUE COMMANDS TO THE STATES

Those who framed our constitutional structure mistrusted all concentrations of power. They designed a system in which "[p]ower [is] almost always the rival of power." The Federalist No. 28, at 181 (A. Hamilton) (Clinton Rossiter ed., 1961) (hereinafter "The Federalist No. ——"). Thus, the Constitution allocates power among the branches of the federal government and between the states and federal governments. Each has its own responsibilities. Each is accountable to the people for the exercise of its powers. The resulting rivalry was intended to be a bulwark "to the rights of the people. The different governments will control each other." The Federalist No. 51, at 323 (J. Madison). *See also* The Federalist No. 28, at 181 (A. Hamilton) ("[T]he general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.").

The role of the federal government was limited; its powers were "few and defined." The Federalist No. 45, at 292 (J. Madison). Even so, the ratification debate revealed that the nation's greatest concern was not strengthening the general government but preserving the states as rival centers of power and guarantors against federal authority. The price of ratification was adoption of a bill of rights, including the tenth amendment, which reemphasized the central role of the states in governing the country.

The Framers' efforts to limit federal power over private citizens by defining its powers narrowly has been largely

undone by the growth of interstate commerce. Over the years, the federal government's reach has expanded as fast and as far as our economy. 2 Encyclopedia of the American Constitution, *Federalism* 697 (1986).

But the growth of the federal role is no reason for the states to abandon the role that the Framers assigned to them. Quite the contrary. Now more than ever, the autonomy of states must be preserved in order to foster leaders, as well as social policies, that challenge national orthodoxy. *New States Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

But the states can only play this constitutional role for so long as they are able to govern in their own way and on their own terms. The growth of the federal commerce power has meant an inevitable restriction on the states' ability to regulate private conduct free from the threat of federal preemption. And a deeply divided Court has recently held that when Congress regulates private conduct it may apply the same rules to the states. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). But neither of those aspects of state sovereignty is at issue in this case.

The issue here is whether Congress's power to "regulate Commerce . . . among the several states" includes the power to regulate the states and only the states, to single out state governments and command them to govern in accordance with Congress's will.

II. THIS COURT HAS NEVER INTERPRETED THE COMMERCE CAUSE TO PERMIT SUBSTANTIVE CONGRESSIONAL COMMANDS TO THE STATES

Such a notion could hardly be further from the Framers' vision. For two hundred years it has been assumed that the commerce clause confers no power to issue commands to the states. As recently as 1977, for example, the Solicitor General of the United States conceded that

federal authorities could not order states to adopt laws or regulations. His brief in that case disavowed "any power to compel the State to carry out its governmental responsibilities. . . . Nor [did] he contend that he can direct the State to adopt laws or regulations . . . that comply with" federal law. Brief for Federal Parties at 20 n.14, *EPA v. Brown*, 431 U.S. 99 (1977) (Nos. 75-909, 75-960, 75-1050, 75-1055). This Court accepted and acted upon the government's concession. *EPA v. Brown*, 431 U.S. 99, 103 (1977).

A. *FERC v. Mississippi* Provides No Authority for Congressional Mandates

The most recent case to examine this issue, *FERC v. Mississippi*, 456 U.S. 742 (1982), does little to modify the assumptions reflected in *EPA v. Brown*. The *FERC* Court cited only one case permitting Congress to single out states for direct regulation—*Testa v. Katt*, 330 U.S. 386 (1947).[1] But in that case, Congress had simply authorized the filing of certain federal claims in state as well as in federal court; *Testa v. Katt* held that state courts could not refuse to hear such claims if the claims otherwise fell within the state courts' jurisdiction. *Id.* at 394.

That limited holding offers no support for the 1985 Act. *Testa v. Katt* simply assured that federal law would be applied on a plane of equality with state law. This is a necessity under a Constitution that envisions the possibility that *all* federal law will be applied by state courts in the first instance. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). And unlike the 1985 Act, the substantive policies of the federal government in *Testa v. Katt* operated only on private citizens; states were not required to adopt the policies as their own.

The Court's reluctance to authorize broader federal commands is illustrated by the opinion in *FERC* itself. To avoid approving a congressional mandate directed at the states, the *FERC* Court first read the federal law in dispute extraordinarily narrowly—reducing it to a handful of redundant procedural requirements and exhortations—and then declared that the law was not in fact a command.

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[1] *FERC* cited two other cases, neither of which is in point here. One was *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, *modified*, 444 U.S. 816 (1979). It was said to show that "[F]ederal law [can] impose an affirmative obligation upon state officials to prepare administrative regulations." *FERC*, 456 U.S. at 762 & n.27. In fact, as Professor Tribe as written,

> The Court in that case held no such thing. The power of the federal Court in *Fishing Vessel Ass'n.* derived from the fact that various state fishing regulations were in direct contravention of a federal Indian treaty and that, as parties to the litigation, the state fish and game agencies could be ordered to comply with the district court's ruling. The *Fishing Vessel Ass'n.* Court expressed its doubt that state agencies "may be ordered actually to promulgate regulations having effect as a matter of state law," and therefore directed that, should the state authorities be unwilling or unable to comply, the district court should take over supervision of the state fisheries and issue its own detailed remedial orders.

Laurence H. Tribe, *Constitutional Choices* 127 (1985) (citations omitted). Thus, *Fishing Vessel Association* simply stands for the proposition that federal courts can enforce their judgments, not that Congress can issue commands to the states.

The other case, *Fry v. United States*, 421 U.S. 542 (1975), upheld the constitutionality of a federal wage freeze that applied "to employees throughout the economy, including those employed by state and local governments." *Id.* at 546. This law, like those examined in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988), applied equally to private and public sectors: "It contained no exceptions for employees of any governmental bodies, even at the federal level." *Fry*, 421 U.S. at 546. As is discussed below, such generally applicable statutes must be analyzed quite differently from laws singling out the states.

The statute reviewed in *FERC* had three elements. The Court treated the first element as nothing more than a variation on *Testa v. Katt*. It required that the Mississippi Utilities Commission "simply . . . open[] its doors" to federal claims similar to the state-law claims it already adjudicated. *FERC*, 456 U.S. at 769. Second, the federal law required state commissions to "consider" adopting various ratemaking standards recommended by Congress. The *FERC* Court noted that the Mississippi Utilities Commission had no obligation to adopt the standards; the federal mandate was "essentially hortatory." *Id.* at 770. The third element—a requirement that the Commission follow certain procedures in considering the standards—was more prescriptive. But the Court concluded that the federal law seemed "to accord few, if any, procedural rights not already established by Mississippi law." *Id.* at 770 n.34.[2] As the Court noted, the lack of identifiable differences between state practice and federal law meant that the federal law necessarily withstood the state's facial attack. *Id.* at 769 n.31. Indeed, if the federal and state procedures were not observably different, the federally mandated procedures were simply not at issue.

Read so narrowly, the federal law could have been upheld simply by ruling that *Testa v. Katt* remains good law and that Congress may address hortatory resolutions to the states. Neither holding would provide support for

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[2] The Court elaborated on this point in another passage:

> It is hardly clear on the statute's face, then, that PURPA's standing and appeal provisions grant any rights beyond those presently accorded by Mississippi law, and appellees point to no specific provision of the Act expanding on the State's existing, liberal approach to public participation in ratemaking.

Id. at 769.

the substantive mandates found in the 1985 Act. But the Court in *FERC* was unwilling to go even that far. It ultimately concluded that the federal law was not even a command; it held that the statute actually offered the states a choice between continued state regulation and federal preemption. While this aspect of the case may not survive more recent case law, *see infra*, pages 22-23, the Court's reluctance to approve even so limited a mandate illustrates the complete lack of constitutional authority for such commands.

B. Cases Denying States Exemptions From Generally Applicable Laws Have No Relevance to This Case

Nor can the 1985 Act be justified by reference to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988). Those cases permitted Congress to impose the same duties on states that it imposed on private parties and the federal government. Both *Garcia* and *Baker* recognized that mandates issued directly to the states would likely be judged under a different standard. And so they should. The reasons the majority gave in *Garcia* and *Baker* for limiting judicial protection of federalism have no application to laws that single out the states for direct regulation.

1. Both *Garcia* and *Baker* set aside for another day the issue presented here. *Garcia*, for example, expressly recognized that the Constitution may place "affirmative limits" on federal action affecting the states. 469 U.S. at 556.

For this proposition it cited *Coyle v. Oklahoma*, 221 U.S. 559 (1911). *Coyle* held that Congress may not deprive a state of the power to choose the location of its capital. *Id.* at 565, 574. Of one thing we may be sure—*Garcia* did not preserve *Coyle* because a state's designation of its capital is more "integral" to self-government than the right to set the wages and hours of state em-

ployees. Quite the contrary, *Garcia* expressly disavowed as futile an effort to identify integral state functions. Rather, *Coyle* remains good law because, unlike the generally applicable wage and hour law upheld in *Garcia*,[3] the congressional enactment invalidated in *Coyle* applied only to a state government—indeed could only apply to a state government.

Like *Garcia*, *South Carolina v. Baker*, 485 U.S. 505 (1988), dealt with a federal statute that imposed the same obligations on states as on private parties and the federal government. *Id.* at 510 n.3 & 514. And like *Garcia*, *Baker* reserved for a later day the validity of laws aimed solely at the states. The *Baker* Court explicitly recognized that *Garcia* did not foreclose "the possibility that the tenth amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests." 485 U.S. at 513.

2. The reticence of the *Garcia* and *Baker* Courts on this issue suggests strongly that a different analysis applies to federal laws that are aimed at state governments. And examination of the reasoning in *Garcia* and *Baker* shows that the Court's two central rationales have no application outside the context of generally applicable federal statutes.

a. First, in *Garcia* the Court rejected its earlier view that certain traditional and integral state functions had to be exempted from generally applicable federal laws. *See National League of Cities v. Usery*, 426 U.S. 833 (1976). The *Garcia* majority concluded that the job of identifying protected state functions was simply too hard:

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional."

[3] The Fair Labor Standards Act covers virtually all employees of private businesses and most individuals "employed by the government of the United States. . . ." *See* 29 U.S.C. § 203(e)(1) & (2) (1988).

469 U.S. at 546-47.

In fact, the need to draw this distinction arises only in the context of federal laws that regulate the private as well as the public sector. State governments engage in a wide variety of commercial activities. In deciding which state activities to exempt from federal law, it is necessary to distinguish the states' most important governmental functions from peripheral commercial activities. *See, e.g., EEOC v. Wyoming*, 460 U.S. 226 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982). Otherwise, all state-owned enterprises would have to be exempted from a vast array of federal regulation.

No such difficulties are posed when Congress's commands are aimed directly at state and local governments. There is only one reason for Congress to single out state governments, and that is to tell the states how to exercise their governmental authority. A federal command aimed solely at state and local governments almost always represents a federal intrusion into the policy-making discretion the state previously exercised. And because it regulates the act of governing, such a law falls outside Congress's power to regulate commerce.

b. The second basis for *Garcia*'s deference to Congress was the view that states are protected by political and structural safeguards that make judicial intervention unnecessary. *Garcia*, 469 U.S. at 547-55.

i. Before showing that no such safeguards restrain Congress from issuing direct federal commands to the states, it is worth pausing for a moment to recall just how remarkable *Garcia*'s analysis is. The sovereignty of the states is a "fundamental principle" of our Constitution. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991).

Fundamental constitutional principles of any sort are rarely entrusted utterly to the political process.[4]

Nor are the Constitution's structural postulates ordinarily left to the tender mercies of the political process. The separation of powers at the federal level, for example, serves the same purpose in the Framers' design as the sovereignty of the states. *See generally* The Federalist No. 51, at 322-23 (J. Madison). The division of power among state and federal governments—like the division of the federal government into three branches or the division of Congress into House and Senate—protects liberty by creating rival centers of power, all with enough power to resist sweeping changes in the law. *Id.* This in turn ensures that political change comes only as a result of sustained consensus instead of a fit of majority enthusiasm.

Given this similarity of purpose, one would expect the Court's approach to policing the borders of executive or legislative power to parallel its approach to the balance between state and federal authority. Yet the Court has never held that the President's potent political safeguards justify abandonment of a judicial role in protecting executive prerogatives.[5]

The analysis employed in *Garcia* and *Baker* is thus at best a constitutional anomaly. There is no basis for ex-

[4] Certainly no such analysis applies to individual rights. In Justice Powell's words, "One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process." *Garcia*, 469 U.S. at 565 n.8 (Powell, J., dissenting).

[5] *See Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (one-house legislative veto unconstitutional). Indeed, the President need not even use his most obvious structural protection—the veto—in order to preserve the claim that a law intrudes unconstitutionally on his prerogatives. *See Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976) (Federal Election Campaign Act violates President's appointment power despite President's approval of Act); *Myers v. United States*, 272 U.S. 52 (1926) (congressional statute denying President's unrestricted power of removal of executive officers is unconstitutional despite President's approval of the statute).

panding a style of analysis so alien to ordinary principles of constitutional interpretation.

ii. *Garcia* and *Baker* are perhaps better grounded in practical politics than constitutional structure. For it is certainly true as a practical matter that federal legislators understand how government works. They understand the difficulties of applying private sector rules mechanically to government agencies. And as the *Garcia* Court observed, they have been willing to grant state and local governments at least partial exemptions from some of these rules. *See Garcia*, 469 U.S. at 552-53.

This modest political success on the part of the states is hardly the same as constitutional protection. And in any event it becomes irrelevant when Congress is offered the opportunity to single out state governments for direct federal mandates. For in practical politics, no legislator can resist a chance to take credit for the good things his or her laws accomplish while letting others take the blame for the bad.

Federal legislation directed at state and local governments inevitably offers this opportunity, as this case shows. Passage of the 1985 Act allowed U.S. Senators and Representatives to tell all generators of radioactive waste in their districts that a solution to the disposal crisis had been found. But when it came time to tell the people of Allegany and Cortland Counties that the solution meant a radioactive dump in their backyards, federal legislators were nowhere to be seen. The ire of the voters was directed entirely at state[6] and local[7] officials. (In

[6] *E.g.*, Phil Fairbanks, *Plan for N-dump Buried in Secrecy for Over a Year*, Buffalo News, June 30, 1991, at A-1, A-13 (opponents to a "secret" plan for a dump site in West Valley blame Governor Cuomo for the deal); Billy House, *Nuke Site Depends on One Man*, Rochester Democrat & Chronicle, July 12, 1991, at 1B, 2B (state legislators feel pressure of opposition in deciding whether to grant town board's request to host dump site).

[7] *E.g.*, Sam Howe Verhovek, *Town Heatedly Debates Merits of a Nuclear Waste Dump*, N.Y. Times, June 3, 1991, at B-1, B-5 (mem-

this light, the United States hardly advances its case by emphasizing, as it does, that New York's Senator Moynihan supported the 1985 Act with enthusiasm. Well he might.)

Permitting Congress to blur state and federal responsibilities in this fashion also runs counter to the Framers' vision of separate state and federal governments, each separately accountable to the voters. "If [the peoples'] rights are invaded by either" state or federal government, Hamilton declared, "they can make use of the other as the instrument of redress." The Federalist No. 28, at 181 (A. Hamilton). But if Congress itself can make use of the states as its own instrument, this counterpoise to central authority is gone.

C. Congressional Commands Cannot Be Justified by Balancing State and Federal Interests

Although neither the case law nor the Constitution authorizes Congressional directives aimed at the states, the United States suggests that a flat prohibition on such directives would be too "wooden." Brief for the United States in Opposition at 17, *New York v. United States*, (Nos. 91-543, 91-558, 91-563) (1991) (hereinafter "U.S. Brief Opp. Cert."). It urges instead that the Court apply a balancing test, said to be derived from *National League of Cities*. *Id.* at 17-18.

The United States asks the Court to balance Congress's interest in avoiding a crisis in radioactive waste disposal against the states' interest in sovereignty. The arguments of the United States in fact show precisely why a balancing test is unwarranted.

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bers of the town board of Ashford face fierce opposition in deciding whether to accept benefits in exchange for dump site at West Valley); Donna Snyder & Phil Fairbanks, *Cattaraugus Says 'No' to N-dump*, Buffalo News, July 16, 1991, at A1, A6 (opposition influences county legislators to vote against incentives linked to West Valley site).

First, there is simply no legitimate federal interest in regulating the states themselves. Without doubt, finding responsible ways to dispose of radioactive waste is an important concern. But any federal interest in regulating radioactive waste disposal can easily be vindicated without issuing directives to the states. Congress has the unquestioned power to regulate interstate traffic in radioactive waste. It has full authority to designate, and even acquire by condemnation, adequate disposal sites. The federal government can thus prevent the crisis it says it fears at any time—simply by taking responsibility for the solution. Practical politics aside, there is no obvious reason why it must cloak itself in the states' authority.

The considerations that the United States places on the other side of the balance also demonstrate a tin ear for the principles of accountability that inform constitutional federalism. New York has already decided to regulate in this field, the United States argues, and in any event the federal mandate leaves lots of details for New York to fill in. U.S. Brief Opp. Cert. at 10-12, 18-19.

These arguments miss the point. It does not matter that New York has already engaged in regulation of radioactive waste or that in 1986 it announced its intention to designate a site for such waste. Democracy is not tidy, and no decision is made once for all time. Self-government means the right to unmake as well as to make decisions, to delay as well as to implement past policies. This aspect of the United States' balancing test is simply a disguised forfeiture of New York's sovereignty.

It is a disguise that quickly wears thin, for the "choice" that New York is said to have exercised has a remarkably elastic definition. In the courts below, the United States argued that once states had made a choice "to participate in the nuclear economy" they could be forced to regulate radioactive waste. Brief for the Defendants Appellees at 37, *New York v. United States*,

942 F.2d 114 (2nd Cir. 1991) (Nos. 91-6031, 91-6033, 91-6035) (hereinafter Brief for Defendants). And according to the United States, a state has chosen to "participate in the nuclear economy" as soon as it engages in any activity that generates low-level waste. *Id.* As this reasoning shows, adjusting the level of abstraction would allow the United States to conclude that any conceivable Congressional mandate is only a supplement to choices already made by the states.

Perhaps most contrary to the Framers' vision of the states' role is the United States' suggestion that the 1985 Act should be upheld because the states retain a large measure of discretion in carrying out Congress's mandate. So does a Regional Director in the U.S. Department of Health and Human Services. But states, unlike federal bureaucrats, are accountable to the voters for the laws they pass and the decisions they make. If Congress may hide its commands like cowbird eggs among the states' enactments,[8] both state and federal representatives will be less accountable. "It is . . . control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires." *Garcia*, 469 U.S. at 579 (Powell, J., dissenting). *See generally* La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577 (1985).

The United States' emphasis on the states' remaining discretion thus avails the 1985 Act not at all. Viewed

[8] Cowbirds are brood parasites: They do not raise their own young, but lay their eggs in the nest of another species, after having removed one egg from the host's clutch. When it hatches and begins to grow, the young cowbird is usually so much larger than the young of its foster parents that the other nestlings either starve or are crowded out.

Audubon Society, Pocket Guides—Familiar Birds of North America 90 (Ann. H. Whitman *et al.* ed., 1986).

through a prism of accountability, federal commands that delegate most of the unpopular decisions to the states are more troubling for the federal system, not less. What is more, the distinction is unworkable in practice. No federal law is so comprehensive as to leave the administrator utterly without discretion, and the United States does not suggest how courts can measure the quantum of state discretion in this or future mandates. It will be fruitless for courts to try to decide which mandates leave the states "enough" discretion. What matters is the leash, not its length.

D. Offering a Choice Between Regulating Waste and Taking Title To It Does Not Save the 1985 Act

1. Nor can the 1985 Act be justified as offering New York a choice between either regulating or taking title to the low-level radioactive waste within its borders. In the first place, this is no choice. New York must designate a waste disposal site in its capacity as a government or the "take title" provision will force New York to find a disposal site in its capacity as owner.

The United States has candidly admitted that this aspect of the law "might raise . . . federalism concerns." U.S. Brief Opp. Cert. at 25. But it suggests that the provision should be approved because it "merely adjusts rights and responsibilities between LLRW generators and the States in which they operate." U.S. Brief Opp. Cert. at 26. It is hard to take this statement seriously. What the provision shifts is *ownership* of the waste. It will make the states involuntary owners of radioactive waste that is now owned by private parties and even by the federal government itself. *See* 42 U.S.C. §§ 2021c(a)(1); 2021e(d)(2)(C). If this is permissible (the United States offers no authority for the point), there is no reason why Congress cannot also "shift responsibility"

to the states for the federal budget deficit and every other inconvenient aspect of governing."

2. In theory, of course, the state has a choice between taking physical possession of the waste and paying damages. The United States suggests that this is a saving grace, because it means that the "take title" provision itself does not directly impose "federal commands and sanctions." U.S. Brief Opp. Cert. at 27. But the Constitution does not protect states solely from federal directives enforced by threats of imprisonment. And apart from imposing criminal liability, there are few sanctions harsher—or more inimical to principles of federalism—than the damages liability envisioned in the 1985 Act. *See Edelman v. Jordan*, 415 U.S. 651 (1974). Moreover, there is no doubt that the damages provision was designed to enforce Congress's mandate, not to offer the states a genuine choice between regulating in this field or not. In the words of one Senator, a co-sponsor of the provision, "the term 'damages' includes both actual and punitive damages. . . . It is a very far-reaching, difficult and punitive provision, but we meant it to be precisely that." 131 Cong. Rec. 38414-15 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston).

This Court has never permitted Congress to coerce the states in such a fashion. It has approved only two methods by which Congress may induce states to follow Congress's lead.

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[9] Nor is the principle saved by limiting it to "pervasively regulated" fields with a "strong public interest." *See* U.S. Brief Opp. Cert. at 26. Until the 1980 and 1985 Acts, disposal of low-level radioactive waste was not pervasively regulated, especially at the federal level. Certainly such regulation was no more "pervasive" than regulation of land use, or mining, or education, or a hundred other fields that are equally the objects of a "strong public interest." If adopted, the argument of the United States would authorize Congress to issue commands in all of these fields and to back those commands by imposition of essentially unlimited financial penalties.

i. The first is the use of federal funds to encourage states to adopt national policies. *See South Dakota v. Dole*, 483 U.S. 203 (1987). Such financial incentives are also consistent with the principles of accountability that underlie the Constitution. As long as Congress must find a source of funds to support a major part of the costs of a regulatory program, it remains far more accountable than if it simply issues a mandate and lets the states try to find the money. Indeed, this Court has been reluctant to approve even financial incentives that go beyond principles of accountability. If Congress threatened to cut off its funding of unrelated state programs as a way of forcing New York to regulate radioactive waste, "the financial inducement offered by Congress might be so coercive as to be unconstitutional." *See Baker*, 485 U.S. at 511 n.6 (*citing South Dakota v. Dole*, 483 U.S. 203, 210-211 (1987)).

The 1985 Act in fact already offers strong financial incentives to the states. States that meet Congress's deadlines receive rebates from a federal escrow account. 42 U.S.C. § 2021e(d)(2). No one has challenged these incentives as coercive or beyond Congress's power. Nor is it clear that these incentives by themselves will not in time lead the states to designate sufficient disposal sites around the nation.[10]

ii. Congress may also offer the states a choice between regulating on their own and letting Congress do it. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding federal statute giving states a choice between administering a federal

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[10] Similarly, the 1985 Act allows other states to exclude New York's waste after January 1, 1993. 42 U.S.C. § 2021e(e)(2)(C). This provision too creates an incentive to join the federal scheme, but it does so in a way that enhances accountability. It makes clear to waste generators in New York that only New York's government can resolve the question of what to do with low-level radioactive waste.

regulatory program or allowing federal government to do so.[11] A choice of this kind is also consistent with the principle of accountability. The states may accept or reject the federal regulatory program. If they reject it, Congress must take responsibility for implementing the program it has devised.

b. The 1985 Act fits neither of these examples. The United States did suggest below that the 1985 Act offers an implicit choice—between regulating in accordance with the federal mandate and participating in the nuclear economy. Brief for Defendants at 39. By this argument, the United States sought to expand a doubtful aspect of the reasoning in *FERC v. Mississippi*, 456 U.S. 742, 763-64 (1982). As noted above, the *FERC* Court was reluctant to approve even the limited mandates and exhortations imposed by Congress in that case, and it strained to find that Congress had actually given the state a choice between regulating utility rates in accordance with federal standards or not regulating at all. *Id.*

Unlike the choice offered in *Hodel*, however, the law at issue in *FERC* did not clearly state that Congress would be responsible for regulating if the states refused to do so. This deviation from principles of accountability is unfortunate because the *FERC* Court had already construed the federal statute so narrowly that it would have passed constitutional muster under *Testa v. Katt*. *See* discussion *supra*, at 8-11. In any event, the narrow reading of federal law adopted in *FERC* may now be the only surviving basis for that decision. The alternative ground—that Congress can intrude on state authority by offering an "implicit" choice between regulation and preemption—has been overtaken by this Court's more recent determination that Congress may not restrict state au-

[11] *See also* 42 U.S.C. § 2021(b) (U.S. Nuclear Regulatory Commission may enter into agreements ceding to states "authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.")

tonomy except by the plainest of statements. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

E. Interstate Adjudications Provide No Authority for Congressional Mandates

In the absence of precedent approving Congressional commands aimed at the states, the United States turns instead to a line of cases in which federal courts have issued judgments resolving interstate disputes over pollution and water rights.[12] The implicit reasoning of the United States is that if this Court can make federal rules to resolve disputes between states then surely Congress can do the same. The analogy is false in nearly every respect.

First, the disputes in the cited cases were inherently interstate in nature. What one state puts into or takes out of a flowing river inevitably affects all the states downstream. But radioactive waste is not an inherently interstate problem; it need not flow across state lines. Indeed, provisions of the 1985 Act that have not been challenged would prevent movement of low level radioactive waste from one state to another in the absence of state consent. 42 U.S.C. § 2021e(e)(2)(C); *see also id.* § 2021e(a).

Second, New York did not submit to Congress's jurisdiction as did the states in the cited cases. The lobbying activities of a group such as the National Governors' Association, which represents one branch of state government, cannot be compared to the formal waiver of state immunity that occurs in state-versus-state litigation. *See, e.g., Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838). This case shows the pitfalls that

[12] U.S. Brief Opp. Cert. at 20-21 (citing *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *New Jersey v. New York*, 283 U.S. 473 (1931); *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Wyoming v. Colorado*, 309 U.S. 572 (1940)).

arise from trying to compare the two. The governors did indeed support many of the Act's elements. But the United States has notably failed to cite any widespread support for the "take-title" provision that was inserted by Congress at the eleventh hour and that is the object of this challenge. Accordingly, even if "lobbyists' waiver" were a constitutionally recognized doctrine, it would not apply to the provision that makes the 1985 Act objectionable.

Third, and perhaps most important, the fact that this Court has jurisdiction to resolve disputes among states does not confer upon Congress the power to issue orders to the states in the same field. This Court frequently decides controversies over state boundaries, *Indiana v. Kentucky*, 136 U.S. 479 (1890), but that does not mean that Congress has authority to redraw state boundaries. *Cf.* U.S. Const. art. IV, § 3.

III. THE EFFECTS OF THE "TAKE TITLE" PROVISION ARE ALREADY BEING FELT

It is no wonder, then, that the United States seeks to avoid a ruling on the constitutionality of the "take title" provision by arguing that the provision's effects will not be felt until the end of 1995. The legal basis for this suggestion is unclear, since the United States admits that it has not challenged the suit as unripe. *See* U.S. Brief Opp. Cert. at 25. Nor can it. There is no dispute that the process of establishing a waste disposal site takes several years.[13] New York must make decisions today about whether and how fast to move on plans for a disposal site. The threat of future sanctions is thus already having a direct and immediate effect on New York's decisions about how to handle low-level radioactive waste.

[13] *E.g.*, H.R. Rep. 314, 99th Cong., 1st Sess., pt. 2, at 19 (1985) (five year period to allow the states to form compacts, select a site, complete license application and review, and construct a facility "has proven too short a time for accomplishing such a series of complex political and technical tasks"); *see also* Brief for Defendants at 10 (citing H.R. Report 314, *supra*).

Indeed, the effect is exacerbated by the nature of the penalty. Were it not for the "take title" provision, New York might reasonably choose to wait until 1996 or later before deciding to permit disposal of low-level radioactive waste within its borders. For example, New York might choose to wait because it expects that the economics of disposal operations will soon improve its bargaining position with other states. There are substantial economies of scale in radioactive waste disposal.[14] New York could reasonably believe that what is now seen as a shortage of waste disposal sites will soon become a glut, so that operators of sites in other states may eventually seek out New York's waste instead of shunning it. New York's estimate of market forces will not be tested until 1993. If its calculation turns out to be wrong, New York will have to designate a site, but it may not be able to complete its own facility by January 1, 1996.[15]

Ordinarily, missing a construction deadline by a few days would not be a driving concern. But because the "take title" provision is triggered if the site is opened even one day too late, a wait-and-see policy exposes New York to a serious risk of acquiring overnight the liability for as much as three years' worth of waste. This greatly increases the risk of choosing a go-slow policy. Thus the 1996 deadline is already narrowing New York's policy options.[16]

[14] *See, e.g.*, Brief for Defendants at 29 & n.29.

[15] There are other legitimate reasons for New York to go slowly. New York's decision-makers might well conclude that only a demonstrable crisis—arising from the refusal of other states to accept New York waste—will create a consensus favoring the opening of an in-state disposal site. Again, such a crisis will not occur until 1993, and even if a crisis galvanizes the state into consensus in that year, New York may not be able to finish a site by 1996.

[16] This is the answer to the United States' suggestion that New York must prove that it will inevitably miss the 1996 deadline—or that the consequences of missing the deadline will be longlasting. U.S. Brief Opp. Cert. at 26. If New York authorities conclude that

Nor can New York afford to wait until 1996 to find out whether the threatened penalty is constitutional. *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (litigants "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979). *Cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding ripeness based on explicit threat of police arrest); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (finding ripeness based on automatic civil enforcement); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (finding ripe a constitutional challenge to a state agency's informal exhortation urging book distributors to stop selling books that the agency, which officially could only recommend prosecution, considered obscene). This is a straightforward if vital legal question, and waiting until the penalty is imposed would not clarify the dispute. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81-82 (1978); *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967).

While disavowing ripeness as a defense, the United States seems to argue that a heavy burden nonetheless rests on New York to prove that the "take title" provision is having a current effect. U.S. Brief Opp. Cert. at 26. Even though a 1986 New York statute makes it plain that the state was compelled to regulate by the 1985 Act, the United States objects that "the introductory section of the law . . . makes no mention of the take-title provision." *Id.* at 25. But there is no basis in law or policy for a reverse "plain statement" requirement, in which states may challenge a coercive federal

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the "take title" provision will ultimately force them to regulate, it makes little sense for them to turn down the financial incentives for meeting Congress's timetable. Thus, the fact that New York has met some of these deadlines does not show, as the United States would have it, that New York has yet to feel the lash of the "take title" penalty.

law only if the states first enact statutes identifying not only the federal law but the precise section that has compelled them to act.

In a similar vein, the United States speculates that the "take title" provision might not be interpreted to create an independent federal cause of action for damages, or that it might not be read as requiring states to take physical possession of the waste. *Id.* at 26 & n.27. But the statute plainly declares that if states do not take possession of the waste they will find themselves "liable for all damages directly or indirectly incurred" by their generators. 42 U.S.C. § 2021e(d)(2)(C). The notion that such unambiguous language does not impose damages liability is strained at best. Senator Johnston, for one, announced that the provision imposes liability for "both actual and punitive damages." 131 Cong. Rec. 38414 (daily ed. Dec. 19, 1985). Certainly no prudent state decisionmaker would count on a narrower interpretation in deciding whether to heed the federal mandate. Speculation of this sort cannot save the "take title" provision from judicial review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY AND THE COUNTY OF CORTLAND,
Petitioners,

v.

THE UNITED STATES OF AMERICA, et al.,
Respondents,

THE STATE OF WASHINGTON, THE STATE OF NEVADA, and THE STATE OF SOUTH CAROLINA,
Intervenors - Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS BRIEF IN SUPPORT OF REVERSAL

AMICUS BRIEF OF THE STATES OF OHIO, ARKANSAS, GUAM, ILLINOIS, INDIANA, KENTUCKY, MAINE, MASSACHUSETTS, NEBRASKA, NEW JERSEY, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, WEST VIRGINIA AND WISCONSIN

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STATEMENT OF INTEREST

Amici have a manifest interest in questions that lie at the core of state sovereignty interests. *Amici* believe the decision of the court of appeals below is a precedent that profoundly impacts the nature of federal - state relations. As explained below, the decision sanctions a statute known as the "Take Title Provision" that violates the Tenth Amendment and Guarantee Clause and shifts substantial liabilities from the Federal Government, and from an industry it has traditionally protected, onto States. *Amici* include States that have entered into compacts under the Low-Level Radioactive Waste Policy Amendments Act of 1985, as well as unaligned States. *Amici* accordingly submit this brief to assist the Court in the resolution of the States' rights issues in this case.

SUMMARY OF ARGUMENT

The Take Title Provision[1] involved in this case should be held unconstitutional because it tramples on state sovereignty by putting state legislative and executive branches squarely under the thumb of Congress. The Take Title Provision compels a State, on and after January 1, 1996, to take title to, possession of and liability for low-level radioactive waste generated within its borders upon request by the generator, unless the State has developed or secured access to a disposal facility to serve generators. This statute will force States to take waste not only from commercial generators, but also from some of the Federal Government's generators.

The Take Title Provision is more "intrusive on state sovereignty" - according to the Congressional Research Service - than any other statute reviewed by a court. The compulsory nature of the provision compels state legislatures and executives to make and implement decisions at the beckoning of the Federal Government. According to its

[1] Section 5(d)(2)(C) of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act"), 42 U.S.C. 2021e(d)(2)(c).

author, it "is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that." 131 Cong. Rec. S18113 (remarks of Sen. Johnston).

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) (*FERC*) framed the question, left open by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina v. Baker*, 108 S.Ct. 1355 (1988), of to what extent the Tenth Amendment "shields" the States from "Federal Government attempts to use state regulatory machinery to advance federal goals." *FERC*, 456 U.S., at 759. *FERC* essentially answered the question as follows: commandeering state regulatory machinery threatens the States' "separate and independent existence," *id.*, at 765, removes their ability to make fundamental decisions which is the "quintessential attribute of sovereignty," *id.*, at 761, and impairs the ability of the States "to function effectively in a federal system." *Id.*, at 765-766. Thus, the Tenth Amendment protects States from federal commandeering of state *regulatory* machinery.

The question presented by this case, however, involves an even more intrusive statute: to what extent does the Tenth Amendment shield the States from the compelled creation and commandeering of state *proprietary* activities in the marketplace to advance federal interests? *FERC*, *Garcia* and *South Carolina* essentially answered the question as follows: "the people - acting . . . through their elected [state] legislative representatives - have the power to determine as conditions demand, what services and functions the public welfare requires." *Garcia*, 469 U.S., at 546. Thus, the Tenth Amendment protects the States from the forced creation and commandeering of state proprietary activities in the marketplace to advance federal interests.

The decision below also clashes with the teachings of *Gregory v. Ashcroft*, 11 S.Ct. 2395 (1991), that the Tenth Amendment reserves to the States, and the Guarantee Clause guarantees them, "authority that lies at the heart of representative government." This includes the power to decide whether and when to pass and to execute laws to

establish a State as a provider of waste management services. The Guarantee Clause guarantees to the States a "Republican Form of Government", U.S. Const. art. IV, Section 4, which is one in which "the people control their rulers." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

The Take Title Provision has the effect of depriving citizens of control over their state government. It has the effect of compelling a State to rearrange its legislative agenda and to pass laws to establish a means for the State to collect, to transport, to treat, to store and or to dispose of waste. It has the effect of compelling a State to use its executive powers to implement such laws, and its judicial powers to resolve disputes. The provision displaces citizen control over how States disburse state-generated tax funds, and puts state treasuries at risk. States are accountable not to their citizens, but to Congress.

The decision below sets a precedent for congressional acts compelling a State to provide not only waste disposal services, but also power generation, hospitals or other services which Congress may feel are inadequately served by the free market or are needed by the Federal Government. The decision also frustrates state innovation such as encouraging the development of private nuclear waste disposal utilities.

The provision threatens serious disruption to the stability of compacts, inasmuch as its legislative history suggests congressional consent to compacts is conditioned on States strictly complying with the provision. While States are generally progressing with the development of disposal facilities, it is anticipated that not all States will be able to develop or to obtain access to a disposal facility by 1996. A self-executing termination of consent would be highly disruptive to compacts under the 1985 Act.

In sum, the Take Title Provision tramples on state sovereignty. *Amici* respectfully request that the Court sever

the Take Title Provision and construe the remainder of the 1985 Act to avoid constitutional problems.

STATEMENT OF THE CASE

Congress passed the Atomic Energy Act of 1954 to promote the commercial use of radioactive materials.[2] The resulting use of radioactive materials in power generation, medical diagnosis and treatment, industry and research produced a growing quantity of commercial radioactive waste.

In the late 1950's the Atomic Energy Commission (AEC) created the term "low-level radioactive waste" to refer to a broad and imprecise category of radioactive waste that includes equipment, sludges, filters, paper and clothing contaminated with radioactive substances.[3] Some low-level radioactive waste remains radioactive for over 300 years and requires extensive shielding from humans.[4]

By 1958 the AEC had licensed six companies to dispose of low-level radioactive waste at sea. Mazuzan & Walker, *supra*, at 354. In response to public outcry, the AEC in the early 1960's ceased licensing sea disposal and began licensing land burial sites. See *id.*, at 364-368. By 1979 two companies were operating three commercial land disposal

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[2] See Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. 2011, et seq.

[3] The Atomic Energy Act of 1954 assigned to the Atomic Energy Commission the responsibility to promote and to regulate commercial use of radioactive materials. See 42 U.S.C. 2021b(9); George T. Mazuzan & J. Samuel Walker, *Controlling the Atom* 346 (1984).

[4] U.S. Congress, Office of Technology Assessment, *Partnerships Under Pressure: Managing Commercial Low-Level Radioactive Waste*, 83-85 (1989). "High-level radioactive waste," on the other hand, remains radioactive for hundreds of thousands of years and requires burial in deep underground repositories. See *id.*, at 82; 42 U.S.C. 10101(12). In 1982 Congress assigned to the Department of Energy the responsibility to develop a repository for high-level radioactive waste. 42 U.S.C. 10101, et seq.

facilities, one each in Nevada, South Carolina and Washington.

In 1980 the National Governors' Association's Task Force on Low-Level Radioactive Waste, acting in response to a perceived national shortage of disposal facilities, recommended that "[e]ach state accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders, except for waste generated at federal government facilities."[5] The NGA Task Force Report recommended the formation of interstate compacts to develop regional facilities. Ct. App. J.A. 241. The NGA Task Force Report preferred state to federal oversight of the development of disposal facilities. *Id.*, at 236.

In 1980 Congress passed the Low-Level Radioactive Waste Policy Act ("1980 Act") which adopted the NGA Task Force Report recommendation of encouraging States to have a primary role in the development of disposal facilities for commercial and state waste. P.L. 96-573, 94 Stat. 3347. However, Congress in the 1980 Act departed from the NGA Task Force Report by also assigning to States responsibility for some of the Federal Government's waste.

The 1980 Act declared that "[i]t is the policy of the Federal Government that . . . each State is responsible for providing for the availability of capacity . . . for the disposal of low-level radioactive waste generated within its borders," including some waste generated by the Federal Government. P.L. 96-573, 94 Stat. 3348. The 1980 Act encouraged the development of regional disposal facilities under interstate

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[5] National Governors' Association, *Low-Level Waste: A Program for Action, Final Report of the National Governors' Association Task Force on Low-Level Radioactive Waste Disposal* 6 (1980) ("NGA Task Force Report"). The States of South Carolina, Nevada and Washington had threatened in 1980 to close the existing low-level radioactive waste disposal facilities located within their borders due to those States' "unwillingness to continue to shoulder the entire national burden for low-level waste." *Id.*, at 2. See Court of Appeals Joint Appendix ("Ct. App. J.A."), at 232, 237, 241.

compacts by allowing such compacts to exclude out-of-compact waste after January 1, 1986, provided the compact had received congressional consent. Congress expected - optimistically in hindsight - that it only would take five years to form compacts and develop disposal facilities.

In response to the 1980 Act, 39 States submitted to Congress seven compacts for congressional consent. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 14, *reprinted in* 1985 U.S. Code Cong. & Admin. News 3002, 3003. However, no new disposal facilities were projected to be operational until the early 1990s. *Id.* The States of Nevada, South Carolina and Washington had each joined compacts that had been submitted to Congress. Congressional consent to their compacts would have allowed their compacts as of January 1, 1986 to exclude out-of-compact waste from the existing disposal facilities located within these States' borders. Generators located in a State not a member of these compacts may have had to store their wastes on site for at least eight years.

In 1984 Representative Udall distributed to the States draft amendments to the 1980 Act that attempted to give more assurance that States would expeditiously develop disposal facilities. Extending access to the existing facilities until the early 1990's also was a concern. A working group under the National Governors' Association developed an "unofficial counter-proposal" that served as a basis for the the eventual amendments. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 1 at 14, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974, 2976.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act") imposes a schedule for the development of disposal facilities. Generators within States not meeting the schedule face denial of access to the three (3) existing facilities and or imposition of surcharges on their disposal fees. 42 U.S.C. 2021e(e)(1) and (2). The 1985 Act also prevents the States of South Carolina, Nevada and Washington from interfering with out-of-state access to the private facilities in their States until January 1, 1993, when the 1985 Act allows

their compacts to close their compact borders. 42 U.S.C. 2021e(a)-(c).

However, Congress added the Take Title Provision to the 1985 Act in the final hours of the legislative session without the same involvement of the National Governors' Association. The Take Title Provision provides as follows:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(C).[6]

The author of the Take Title Provision described it as "a very far reaching, difficult, and punitive provision." 131 Cong. Rec. S18113 (remarks of Sen. Johnston). Senator McClure, chair of a committee having jurisdiction over the legislation, doubted its constitutionality. *Id.*, at S18114, S18118. Representative Markey concluded the provision "may not pass a constitutional challenge." *Id.*, at H13077. A Congressional Research Service analysis requested by

[6] This *amicus* brief takes no position on whether the Take Title Provision applies to South Carolina, Washington and Nevada, all of which have intervened in this case in support of the United States, or whether that provision applies to any State in a compact with the intervening States. Nothing in this *amicus* brief is intended to affect a State in a compact with the intervening States regarding applicability of the Take Title Provision.

Representative Markey concluded that the provision is unprecedented and raises "constitutional issues" under the Tenth Amendment. *Id.* The analysis found that "[t]here does not appear to be pertinent judicial precedent that has upheld in the face of the 10th Amendment objections a federal mandate as intrusive on state sovereignty as the [federal compulsion] at issue here." U.S. Congress, Congressional Research Service, *Constitutional Issues Raised By the Imposition of Liabilities on the States Under A Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980*, Memo to House Committee on Energy and Commerce, December 16, 1985, page CRS-5.[7]

Congress has consented to nine interstate compacts in furtherance of the objectives of the 1985 Act. While States are generally progressing with development of disposal facilities, it is anticipated that not all States will be able to develop or obtain access to a disposal facility by 1996.

ARGUMENT

One of the greatest challenges facing the Framers of the Constitution was the allocation of power between the Federal Government and the States. The historical analysis in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 791-796 (1982)(dissenting opinion), shows that the Framers intended that the sovereignty of the States be an important factor in the balance of power, thereby avoiding the creation

[7] The 1985 Act has a second provision that presents serious constitutional concerns. Title 42 U.S.C. Section 2021c(a)(1) provides that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States," for the disposal of three (3) classes of low-level radioactive waste generated within the State by private and some Federal Government generators.

To the extent, if any, that this provision may be construed as establishing a cause of action for failure of a State, including any State not subject to the Take Title Provision, to comply with the provision, it also unconstitutionally infringes on state sovereignty in the manner described herein for the Take Title Provision.

of a lone "super-sovereign" with complete control over the affairs of the citizenry:

> "The National Government received the power to enact its own laws and to enforce those laws over conflicting state legislation. The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt. This product of the Constitutional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign." *Id.*, at 795-796.

In the case at bar, the court of appeals below failed to protect state sovereignty due to a misreading of the Tenth Amendment and Guarantee Clause decisions of the Court. The Court should hold the Take Title Provision unconstitutional, sever it from the 1985 Act and construe the remainder of the 1985 Act to avoid constitutional concerns.

I. THE TAKE TITLE PROVISION VIOLATES THE TENTH AMENDMENT BY COMPELLING THE CREATION AND COMMANDEERING OF STATE PROPRIETARY MACHINERY IN THE MARKETPLACE FOR FEDERAL INTERESTS.

The Court's three most recent major Tenth Amendment cases, discussed below, indicate that to date the Court has left open the question: to what extent does the Tenth Amendment shield the States from federal commandeering of state regulatory machinery? These three cases effectively answer the question as follows: the Tenth Amendment protects the States from such intrusions on state sovereignty. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. 10.

In *Federal Energy Regulatory Commission v. Mississippi*,

456 U.S. 742 (1982)(*FERC*), the Court considered the question of to what extent the Tenth Amendment "shields" the States from "Federal Government attempts to use state regulatory machinery to advance federal goals." *Id.*, at 759. The statute at issue directed state utility regulatory commissions to "consider" the adoption and implementation of specific "rate design" and regulatory standards.* The Court first distinguished prior Tenth Amendment cases as involving "generally applicable federal regulations," and noted that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations . . ." *Id.*, at 759, 761-762. The Court saw such a command as implicating the essence of state sovereignty:

> "We acknowledge that '*the authority to make . . . fundamental . . . decisions is perhaps the quintessential attribute of sovereignty.* Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. . . . *It would follow that the ability of a state legislative (or, as here, administrative) body - which makes decisions and sets policy for the State as a whole - to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.*" *Id.*, at 761 (citations omitted) (emphasis added).

FERC upheld PURPA because it merely required the consideration, not the adoption, of regulatory standards. Nor did PURPA "set a mandatory agenda to be considered in all events." *Id.*, at 769. " '[T]here can be no suggestion that [PURPA] commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program.' " *Id.*, at 764-765, quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264, 288 (1981).

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* Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (PURPA). *FERC*, 456 U.S., at 746.

Like the statutes in pre-*FERC* cases, the statute in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the next major case, involved a "generally applicable federal regulation." The regulation required SAMTA to comply with overtime obligations under the Fair Labor Standards Amendments (FLSA). In contrast to the Take Title Provision, the regulation in *Garcia* did *not* compel Texas to create SAMTA, or allow the Federal Government to commandeer it. To the contrary, the Court, in reviewing the nation's history of state proprietary activity, concluded States must be free to choose whether to engage in such activities:

> "The essence of our federal system is that within the realm of authority left open to them under the Constitution, *the States must be equally free to engage in any activity that their citizens choose for the common weal*, no matter how unorthodox or unnecessary anyone else - including the judiciary - deems state involvement to be. . . . 'The genius of our government provides that, within the sphere of constitutional action, *the people - acting not through the courts but through their elected [state] legislative representatives - have the power to determine as conditions demand, what services and functions the public welfare requires.*' *Helvering v. Gerhart*, 304 U.S. [405, 427 (1938) (concurring opinion).]" *Id.*, at 546.

Under the then existing "traditional government function" test, Tenth Amendment immunity from "generally applicable federal regulations" was dependent, *inter alia*, on whether States had traditionally engaged in the type of proprietary activity involved in the case. See, *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). The Court, however, did not believe a State should suffer the loss of immunity by engaging in innovative proprietary activity. *Garcia*, 469 U.S., at 546. To the contrary, it found that the freedom to choose whether to engage in proprietary activity allows States "to serve as laboratories for social and economic experiment." *Id.* The Court, for this and other reasons, thus rejected the

traditional government function test "as unsound in principle and unworkable in practice." *Id.*

The Court neither doubted the existence of "limits on the Federal Government's power to interfere with state functions," nor saw the case at hand as requiring the Court "to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States." *Id.*, at 547, 566. Insofar as concerned the case at hand, a case involving a generally applicable federal regulation, the Court turned to "the structure of the Federal Government itself." *Id.*, at 554, 550. It set forth a two-part test for Tenth Amendment immunity: the immunity "must find its justification" in the "structure of the Federal Government," and it "must be tailored to compensate for possible failings in the national political process." *Id.*, at 554, 550. As the Court saw the structure of the Federal Government and the national political process as protecting States in the case, the Court upheld the application of FLSA to SAMTA.

The third major Tenth Amendment case, *South Carolina v. Baker*, 108 S.Ct. 1355 (1988), like *Garcia* and pre-*FERC* cases, also involved a "generally applicable federal regulation," in this case a tax statute that effectively prohibited the issuance of bearer bonds.[9] Since the statute did not attempt to compel the State to issue bonds of any type, the Court distinguished the case from *FERC*, "which [had] left open the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests." *Id.*, at 1361. As there only was a generally applicable federal regulation and no "commandeering" of state legislative or regulatory machinery, the Court upheld the statute under *Garcia* due to the absence of any allegations of defects in the political process.

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[9] Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub.L. 97-248, 96 Stat. 596, 26 U.S.C. 103(j)(1). TEFRA was intended to reduce tax fraud by encouraging the issuance of more easily traceable registered bonds.

FERC framed the question, which *Garcia* and *South Carolina* left open, of to what extent the Tenth Amendment "shields" the States from "Federal Government attempts to use state regulatory machinery to advance federal goals." *FERC*, 456 U.S., at 759. *FERC* essentially answered the question as follows: commandeering state regulatory machinery threatens the States' "separate and independent existence," *id.*, at 765, removes their ability to make fundamental decisions which is the "quintessential attribute of sovereignty," *id.*, at 761, and impairs the ability of the States "to function effectively in a federal system." *Id.*, at 765-766. Thus, the Tenth Amendment protects States from federal commandeering of state *regulatory* machinery.

The question presented by this case, however, involves an even more intrusive statute: to what extent does the Tenth Amendment shield the States from the compelled creation and commandeering of state *proprietary* activities in the marketplace to advance federal interests? The Take Title Provision is far more intrusive than the statute in *FERC*. Here, a State must pass and execute laws to establish itself as a market proprietor of waste services. It can not cease the proprietary activity. The statute puts at risk the state treasury. State elected officials become accountable to the Federal Government, not to their citizens. *FERC*, *Garcia* and *South Carolina* essentially answered the question as follows: "the people - acting . . . through their elected [state] legislative representatives - have the power to determine as conditions demand, what services and functions the public welfare requires." *Garcia*, 469 U.S., at 546. The Tenth Amendment protects the States from the forced creation and commandeering of state proprietary activities in the marketplace to advance federal interests.[10]

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[10] The Eleventh Amendment is a third expression of federalism and republicanism which recognizes the sovereignty of the States as an important force in the balance of power between the States and the Federal Government. It is a restraint on judicial power, intended to support the sovereignty of the States and to limit state exposure to liability in the federal court system. The Eleventh Amendment functions as a protection for the benefit of the States as sovereigns. To the extent the Take Title Provision purports to expose the States to claims as

Amici join Petitioner State of New York in urging the Court to find the Take Title Provision in violation of the Tenth Amendment. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983). "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177-179 (1803)." Otherwise, Congress could compel a State to provide not only waste disposal services, but also power plants, airports, hospitals and whatever other services or goods Congress may feel are lacking in the marketplace or needed by the Federal Government.

II. THE TAKE TITLE PROVISION VIOLATES THE GUARANTEE CLAUSE AND THE TENTH AMENDMENT BY COMPELLING A STATE TO PASS AND TO EXECUTE LAWS ENGAGING THE STATE IN PROPRIETARY ACTIVITY.

The Guarantee Clause of the U.S. Constitution ensures that citizens have proper control over their state

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[10] *(Footnote 10 cont.)*
an indemnitor of other generators within its borders, the Take Title Provision implicates the State's sovereignty which the Eleventh Amendment is intended to support.

[11] The two-part "political process" test of *Garcia* does not apply here because the Take Title Provision is not a "generally applicable federal regulation." See above discussion. The Take Title Provision nevertheless is unconstitutional under that test as well. First, the political process can not ensure protection of States' rights when federal and state interests conflict such as here. Congress had an interest in compelling States to handle the Federal Government's waste problem. Moreover, Congress had an interest in shifting to States any risk of the federal program not accomplishing its objective of giving generators access to disposal facilities by January 1, 1996. Second, the structure of the Federal Government provides judicial checks and balances which are needed in this case because of the conflict between federal and state interests.

governments. That clause provides that "the United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, Section 4. "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

In *Gregory v. Ashcroft*, ___ U.S. ___, 111 S. Ct. 2395 (1991), the Court recently invoked the plain statement rule, a rule of statutory interpretation, to avoid a "potential constitutional problem" presented by a requested application of the Federal Age Discrimination in Employment Act of 1967 (ADEA) to preempt a mandatory retirement provision for judges in a state constitution. The Court reviewed its precedents and concluded that the Guarantee Clause is a shield against congressional intrusion on state authorities at the heart of representative government:

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. *It is an authority that lies at " 'the heart of representative government.' "* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantees to every State in this Union a Republican Form of Government."

Id. (citations omitted) (emphasis added). Thus, the Court narrowly construed the ADEA and upheld the state mandatory retirement provision.

The lower court's decision clashes with the teachings of *Ashcroft* that the Guarantee Clause is a shield against congressional infringement on the authority of a State to

make decisions that lie at "the heart of representative government." *Id.*[*] The heart of state representative government includes the power to set a legislative agenda and to decide whether and when to pass laws, particularly if the State is to decide whether or when to become a market participant. The decision below, however, renders the Guarantee Clause powerless to prevent Congress from forcing States to become agents of the federal government.

The compulsory nature of the Take Title Provision deprives citizens of control over state government. The provision has the effect of compelling a State to alter its legislative agenda and to pass laws to establish a means for the State to collect, to transport, to treat, to store and or to dispose of waste. It has the effect of compelling a State to use its executive powers to implement such laws, and its judicial powers to resolve disputes. It displaces citizen control over how States disburse state-generated tax funds. States are accountable not to their citizens, but to Congress.

The Tenth Amendment, however, reserves to the States, and the Guarantee Clause guarantees them, the the power to decide whether and when to pass and to execute laws to provide waste management services as a market participant. These decisions lie at "the heart of representative government." *Ashcroft, supra*. "Federal attempts to appropriate state governmental resources [to force implementation of federal policies] deny the states a republican form of government." Merritt, 88 Colum. L. Rev., at 61. The Take Title Provision violates the Guarantee Clause and the Tenth Amendment.

III. THE TAKE TITLE PROVISION'S VIOLATIONS OF THE TENTH AMENDMENT AND GUARANTEE CLAUSE ARE EGREGIOUS.

The Take Title Provision egregiously commandeers state

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[*] *Ashcroft* was decided after oral argument of this case in the court of appeals below.

sovereignty in violation of the Tenth Amendment and Guarantee Clause. First, there is no place for "punitive" regulation of sovereign States in our system of federalism. Yet, according to the author of the Take Title Provision, the provision "is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that." 131 Cong. Rec. S18113 (remarks of Sen. Johnston).

Second, Congress itself in the 1985 Act found it neither reasonable nor appropriate to impose a similar burden on the Federal Government in the analogous area of federal development of disposal facilities for a fourth class of low-level radioactive waste, see 42 U.S.C. 2021c(b)(1)(D) (greater-than-class C waste), or for high-level radioactive waste. 42 U.S.C. 10222(a)(1) and 10143 (Department of Energy takes generator's high-level radioactive waste only after DOE facility is available). To the contrary, a congressional study recognized the difficulties the Federal Government has encountered in nuclear waste management. U.S. Congress, Office of Technology Assessment, *Managing Commercial High-Level Radioactive Waste* 10 (1982) ("*The greatest single obstacle* that a successful waste management program must overcome *is the severe erosion of public confidence in the Federal Government* that past problems have created") (emphasis in original).

The third reason the provision egregiously commandeers state sovereignty is that it allows Congress to shift liabilities from the Federal Government, and from an industry it has traditionally protected, onto States. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1978) (Atomic Energy Act "encouraged the private sector to become involved in the development of atomic energy for peaceful purposes"). The provision even could have the adverse effect of encouraging the Federal Government and industry to generate more waste.

If the provision were upheld, it could encourage Congress to require States to provide whatever services Congress found to be difficult or distasteful to handle.

> "If Congress is allowed gratuitously to order the states to perform federal tasks, it will not have to pay for what it gets. As ideas for federal projects grow but resources lessen, the incentives will grow stronger for Congress to command the state government to perform the federal programs for free." Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907, 929 (1989).

Thus, the Take Title Provision egregiously commandeers state sovereignty in violation of the Tenth Amendment and Guarantee Clause.

IV. THE COURT SHOULD SEVER THE TAKE TITLE PROVISION AND CONSTRUE THE REMAINDER OF THE 1985 ACT TO AVOID CONSTITUTIONAL CONCERNS.

The Take Title Provision *now* should be held unconstitutional in its entirety because its legislative history indicates an expressed intent to preclude States from challenging the constitutionality of the provision as a defense to an enforcement action after January 1, 1996. A failure of a compact State to comply with the Take Title Provision, for whatever reason, risks a self-executing termination of congressional consent to its compact. Congress' consent to compacts has been "subject to" the 1985 Act. See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, P.L. 99-240, 99 Stat. 1859 (passed concurrent with 1985 Act). "[T]he failure to comply voluntarily with the requirement that title and possession be taken - one of the principal conditions of consent to any regional compact - means that the entire compact in which such State is a member will be null and void, invalid, and cannot be implemented." 131 Cong. Rec. S18252 (remarks of Sen. Simpson).

Termination of consent would be highly disruptive to the compact system under the 1985 Act. See *Tobin v. United States*, 306 F.2d 270, 272-273 (D.C. Cir. 1962), *cert. den.*, 371 U.S. 902 (1962) ("suspicion of even potential

impermanency would be damaging to the very concept of interstate compacts"). Congressional consent expressly allows compacts to exclude out-of-compact waste, which is a centerpiece of the 1985 Act. The Take Title Provision, if left to stand, risks serious disruption to the compact system under the 1985 Act. Thus, the Court now should hold the provision unconstitutional in its entirety.

It is the duty of a court to separate constitutional provisions from unconstitutional provisions, and to maintain the remainder of the act in so far as it is valid. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id.*, at 685. The "relevant inquiry in evaluating severability is whether the [remainder of the] statute will function in a *manner* consistent with the intent of Congress." *Id.* (emphasis in original).

Here, the language and structure of the 1985 Act and its legislative history indicate a congressional intent of severance of the Take Title Provision from the remainder of the 1985 Act. The Take Title Provision is independent in its operation from the remainder of the 1985 Act. Severing the provision would not affect the remaining milestones encouraging States to develop or obtain access to disposal facilities. Thus, the remainder of the 1985 Act would function in the manner intended by Congress.

The legislative history of the 1985 Act indicates that Congress would have passed the 1985 Act without the Take Title Provision had it known the provision was unconstitutional. First, Senators and Representatives uniformly expressed the urgency to pass legislation by the end of 1985 in order to avert a second waste disposal crisis. Second, they also uniformly stressed passage of legislation embodying the "unofficial counter-proposal" of the National Governors' Association. The "unofficial counter-proposal," highly praised by Senators and Representatives, did not include the Take Title Provision. Third, the House passed the 1985 Act without the Take Title Provision. The 1985 Act

was based on NGA's "unofficial counter-proposal." Fourth, the Senate only raised the Take Title Provision in the rush of the final hour of the 1985 legislative session. Thus, the language and structure of the 1985 Act and its legislative history indicate a congressional intent to pass the 1985 Act without the Take Title Provision.[13]

It is an elementary rule that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 108 S.Ct. 1392, 1397 (1988). "[T]he Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.*

The 1985 Act has a second provision - the "General Assignment Provision" - that presents serious constitutional concerns. However, unlike the Take Title Provision, this provision is amenable to a reasonable construction to save it from unconstitutionality. Title 42 U.S.C. Section 2021c(a)(1) provides that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States," for the disposal of three (3) classes of low-level radioactive waste generated within the State by private and some Federal Government generators. To the extent, if any, that the General Assignment provision may be construed as establishing a cause of action for failure of a State to comply with this provision, it also unconstitutionally infringes on state sovereignty in the manner described herein for the Take Title Provision.

The General Assignment Provision may be reasonably construed to be a policy statement or statement of intent for the 1985 Act. There is nothing in the legislative history

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[13] Although the 1985 Act did not include a severability provision, "Congress' silence is just that - silence - and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S., at 686. Also, notwithstanding the statements of some Senators on severability, there was broad consensus in the Senate that the remainder of the 1985 Act was critically needed to avert a crisis.

to indicate that the General Assignment Provision is anything but a congressional policy statement or statement of intent. Moreover, its predecessor provision in the 1980 Act expressly stated that it was the "policy" of the Federal Government that states had disposal responsibilities. Thus, the Court should reasonably construe the General Assignment Provision to save it from unconstitutionality.[14]

[14] If the Court does not construe the General Assignment Provision, however, it should declare the provision unconstitutional and sever it for the same reasons discussed for the Take Title Provision. The Court also should reasonably construe the milestone requirements at 42 U.S.C. 2021e(e)(1) merely as preconditions for avoiding surcharges and denial of access under 42 U.S.C. 2021e(e)(2), for the same reasons discussed above for the General Assignment Provision.

CONCLUSION

Amici respectfully request that the Court sever the Take Title Provision and construe the remainder of the 1985 Act to avoid constitutional concerns.

Respectfully submitted,

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OCTOBER TERM, 1991

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v.

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THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,
Intervenors-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF US ECOLOGY, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS UNITED STATES OF AMERICA, *ET AL.*

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BRIEF OF US ECOLOGY, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS UNITED STATES OF AMERICA, *ET AL.*

INTEREST OF THE *AMICUS CURIAE*

US Ecology, Inc. ("US Ecology") submits this brief as *amicus curiae* in support of Respondents' arguments upholding the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021i (Supp. III

1985) ("1985 Amendments").[1] Enactment of the 1985 Amendments followed congressional passage in 1980 of the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d (1982) ("1980 Act"), and at the express request of the states, afforded them significant control over the location and operation of disposal facilities for low-level radioactive waste ("LLRW") generated within their respective borders.

US Ecology and/or its predecessor have been managing LLRW, their principal business, since 1952. The company has a significant interest in this case as the current operator of two of the nation's three existing LLRW disposal facilities—those located near Beatty, Nevada, and Richland, Washington. US Ecology's Nevada facility has been scheduled to close on January 1, 1993, and the Washington facility will become the designated regional facility for the Northwest Interstate Compact on Low-Level Radioactive Waste Management ("Northwest Compact").[2]

US Ecology also has an interest in this case as the "license-designee" for the development and operation of new regional LLRW disposal facilities for the Southwestern Low-Level Radioactive Waste Disposal

[1] US Ecology files this brief by consent of the parties, pursuant to Rule 37.3 of the Rules of this Court. The parties' letters of consent have been filed with the Clerk.

[2] The Northwest Compact consists of the states of Washington, Oregon, Idaho, Montana, Utah, Alaska and Hawaii. 42 U.S.C. § 2021d note; *see also Nuclear Waste—Slow Progress Developing Low-Level Radioactive Waste Disposal Facilities*, U.S. General Accounting Office Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO RCED-92-61 (January 1992) (hereinafter *"GAO Report"*) at 13.

Compact ("Southwestern Compact")[3] and for the Central Interstate Low-Level Radioactive Waste Compact ("Central Compact").[4] California is the host state for the Southwestern Compact, and US Ecology is itself financing development of that regional facility pursuant to California state laws. Since 1986, the company has invested approximately $24,256,000 on this project. Nebraska is hosting the Central Compact's regional facility, the development of which is being funded jointly by US Ecology and the major LLWR generators in that compact. Since 1987, US Ecology has invested approximately $6,260,000 of its own funds in siting and licensing efforts in Nebraska.

Based on the foregoing, and in light of US Ecology's forty-year involvement in the handling of LLRW, US Ecology has a vital interest in this challenge to the constitutionality of the 1985 Amendments.

SUMMARY OF ARGUMENT

US Ecology, as *amicus curiae*, supports the position of the United States and urges the Court to uphold the constitutionality of the 1985 Amendments in their entirety. For the reasons primarily set forth by the United States in its brief, the 1985 Amendments do not impermissibly infringe upon state sovereignty. As explained below, the 1985 Amendments also are necessary to ensure that the nation timely

[3] The Southwestern Compact consists of the states of California, Arizona, North Dakota and South Dakota. 42 U.S.C. § 2021d note; *see also GAO Report* at 13.

[4] The Central Compact consists of the states of Nebraska, Kansas, Oklahoma, Arkansas and Louisiana. 42 U.S.C. § 2021d; *see also GAO Report* at 13.

develops the LLRW disposal capacity required to support the medical, industrial, academic and other activities which produce such waste, and to assure that such development occurs in a manner which does not unduly burden any state.

In fact, the 1980 Act and 1985 Amendments were enacted by Congress to resolve a LLRW disposal crisis which threatened the country in the late 1970s. In the 1980 Act and 1985 Amendments, Congress, at the urging of the states, accommodated both federal and state interests in an effective manner that avoided extensive intrusion in state affairs by providing a broad range of options and primary control to the states for the development of new LLRW disposal facilities. In so doing, Congress established

> a program of cooperative federalism that allows the states, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

Hodel v. Virginia Surface Mining & Reclam. Ass'n, 452 U.S. 264, 289 (1981).

Following passage of the 1980 Act and 1985 Amendments, the states have made substantial progress in implementing regional solutions for LLRW disavow and undo the responsibilities voluntarily undertaken under both the 1980 Act and 1985 Petitioner New York, and the states filing *amicus* briefs in support of petitioners, however, now seek to disavow and undo the responsibilities voluntarily undertaken under both the 1980 Act and the 1985 Amendments by challenging the very legislation they and other states persuaded Congress to enact.

Because the 1985 Amendments do not unduly burden the states or tread on their sovereignty, but

rather equitably balance the rights and obligations of all states, including the three states now providing LLRW disposal capacity for the entire nation, the Court should affirm the Second Circuit's decision upholding the constitutionality of this legislation. Should the 1985 Amendments be invalidated, the LLRW disposal crisis of the late 1970s will return and result in potentially devastating impacts on the essential societal activities which produce this waste.

ARGUMENT

I. LLRW DISPOSAL HAS BEEN AN ISSUE OF VITAL CONCERN SINCE THE 1970s

A. LLRW Is Generated From A Diverse Variety Of Activities Highly Beneficial To Society

LLRW is a general term describing a wide variety of waste contaminated by radioactivity, including protective clothing, machinery, hardware, glassware, laboratory wastes, compacted solids and other substances. Over one million cubic feet of LLRW is generated annually nationwide, by nuclear power plants, businesses, hospitals and universities.[5]

Under the 1985 Amendments, states are responsible for a specific subset of LLRW defined by regulation in the licensing requirements for land disposal of radioactive waste, 10 C.F.R. § 61.55 (1982). Approximately ninety-seven percent of LLRW for which the states are responsible decays to safe levels within less than one hundred years, with the remainder decaying to acceptable levels witnin three hundred to five hundred years.[6]

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[5] *GAO Report* at 8.

[6] *GAO Report* at 8.

Examples of activities generating LLRW for which states are responsible include: (1) the use of radioactive isotopes in medical therapy, including the administration of Iodine-131 to treat overactive thyroid glands; (2) the use of radioactive isotopes as tracers to evaluate tissue or organ functions, such as in stress tests to determine cardiac activity, and to locate and treat prostate and certain other cancers; and (3) the addition of radioactive tracers to new drugs to evaluate the way in which the body processes the drug.[7] Biotechnology, one of the most important emerging industries in the country today, generates LLRW as an unavoidable byproduct of its activities. University laboratories conducting both basic and applied science research also generate LLRW, as do a variety of businesses manufacturing consumer products (*e.g.*, building exit signs, household smoke detectors). Hospitals, universities, radiopharmaceutical companies and small businesses do not generally have the capacity or the ability to store LLRW generated by their activities for extended time periods. Providing safe LLRW disposal is therefore an extremely important component of the infrastructure needed to support modern society.

B. The 1980 Act Was Enacted To Solve A National LLRW Disposal Crisis

In 1979, the states of Washington, Nevada and South Carolina threatened to close the only three

[7] Adelstein & McKusick, *"Not in My Back Yard": Low-Level Radioactive Waste and Health*, Harv. Medical School Health Letter (April 1986); Brill, Alten, Lutzker, McKusick, Petersen, Powell & Weir, *Disposal of Low-Level Radioactive Waste—Impact on the Medical Profession*, 17 J.A.M.A. 2449, 2451 (Nov. 1, 1985).

commercial LLRW disposal facilities in the nation.[8] In essence, these states were no longer willing to carry the national burden for LLRW disposal and wanted greater control over the origin and amount of wastes accepted at their facilities, including the right to prohibit the importation of wastes from other states.[9]

The Washington and Nevada facilities, constructed and operated by US Ecology, have been accepting LLRW for disposal since 1962 and 1963, respectively. The South Carolina facility opened in 1971.[10] Three other LLRW facilities in Kentucky, New York, and Illinois had closed by 1978.[11] Prior to passage of the 1980 Act, *no* state had taken any action to provide for the construction or operation of additional LLRW disposal facilities. In fact, some states, such as California, had enacted laws which functionally prohibited the licensing of such facilities.[12] Not surpris-

[8] In fact, two of the states had closed their facilities for short periods of time in the late 1970s in protest over waste transportation practices in those states. J.A. at 108a. In 1980, Washington citizens approved an initiative, later struck down as unconstitutional, banning the disposal of out-of-state waste from the Hanford facility. *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

[9] Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437, 439 (1987).

[10] *Id.*

[11] *Id.*

[12] The California Radiation Control Law, 1965 Cal. Stat. 1550, prohibited the issuance of any LLRW disposal facility

ingly, private companies were disinclined to develop new sites given the tremendous financial risks created by the public controversy which surrounds radioactive waste disposal. Therefore, as a practical matter, closure of the Washington, Nevada and South Carolina facilities would have left the nation's hospitals, universities and industries with no ability to safely and legally dispose of their LLRW.

The 1980 Act, and subsequently the 1985 Amendments, were enacted to resolve this crisis by keeping the three existing sites open to the country for the time reasonably required for the states to organize themselves and develop new facilities, preferably on a regional basis which was both authorized and encouraged under the new laws. Requiring the development of new facilities relieved the unfair burdens that had been placed on Washington, Nevada and South Carolina. The 1985 Amendments ensured that a *de facto* return to the former unfair situation would not occur as a result of the unwillingness of some states to provide for disposal of LLRW generated within their borders.

II. UNDER THE 1980 ACT AND 1985 AMENDMENTS, STATES HAVE MADE SIGNIFICANT PROGRESS IN SOLVING THE LLRW DISPOSAL CRISIS

The constitutionality of the 1985 Amendments is not a purely legal question to be decided in a vacuum. Before passage of the 1980 Act and the 1985 Amendments, no state or private concern had initiated any effort to provide for new LLRW disposal capacity.

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license unless the facility was determined to be necessary for the state's economy, a finding which could not be made in light of the available disposal sites in Washington and Nevada.

Since passage of those laws however, states have made significant strides in solving the nation's LLRW disposal crisis.

As evidenced by the crisis which precipitated passage of the 1980 Act, solving the LLRW disposal problem requires federal legislation to ensure both that the country develops the necessary LLRW disposal facilities and that all states are treated equitably. The 1980 Act and 1985 Amendments empower the states to work together to develop regional LLRW disposal facilities and do not restrict the manner in which states may choose to provide for that disposal. States may construct their own facility or join a regional compact which will develop a facility for use by each of its member states.[13] Alternatively, a compact may establish arrangements with another compact or state to provide disposal facility access.

Most states have elected to join compacts which provide for regional disposal facilties.[14] Additionally, some states and compacts have chosen to engage private enterprise to undertake the development and construction of a LLRW disposal facility, rather than use state funds to finance facility development costs. For example, US Ecology currently is developing LLRW disposal facilities in California and Nebraska under agreements which do not rely on state appropriations for development expenses. It is precisely these types of flexible arrangements which the 1980 Act and 1985 Amendments intended to encourage, and which satisfy both federal and state concerns.

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[13] 42 U.S.C. § 2021d(a)(1), (2).

[14] By 1983, more than forty states had formed seven regional compacts, and currently forty-two states are members of nine compacts. *GAO Report* at 10, 12.

A. California Has Reached The Final Licensing Stages For Its Facility

California and the other members of the Southwestern Compact have made substantial progress toward the establishment of a regional LLRW disposal facility. In 1982, the California legislature directed the state Department of Health Services ("DHS") to study the feasibility of reducing LLRW generation, plan for interim storage of LLRW within California if the state were barred from existing disposal sites, develop screening criteria for selecting a disposal site in the state, and survey the state and identify regions most likely to meet those siting criteria. California Radiation Control Law, Cal. Health & Safety Code § 25811.5 (West 1984).

In 1983, the California legislature established a procedure for selecting a private company to site, construct and operate the state's LLRW disposal facility, and directed DHS to adopt regulations governing that facility's licensing and operation. Cal. Health & Safety Code § 25812 (West Supp. 1992). In 1984, DHS adopted the necessary regulations,[15] and completed state-wide regional screening which eliminated all but 20,000 square miles of the state from consideration as the location for the state's LLRW disposal facility.

US Ecology was selected as the "license-designee" for the California site in December 1985 and posted the required $1 million in performance guarantees. Site selection began shortly thereafter. The company has spent approximately $24,256,000 of its own funds on the site selection process, an extensive public information and involvement program, environmental

[15] Requirements for Land Disposal of Radioactive Waste, Title 17, Cal. Code of Regs. §§ 30470-30499 (1990).

impact and technical licensing studies, the facility design, preparation of the license application and responses to the state's technical review. The DHS has used US Ecology's annual license fee of $250,000 and the 1985 Amendments surcharge fee rebates to pay its costs in overseeing US Ecology's activities and conduct the technical licensing reviews and environmental impact analyses necessary for facility construction and operation. US Ecology will recover its investment, and a reasonable return on that investment, from fees charged for LLRW disposal at the new facility.[16]

In 1987, the California legislature ratified the Southwestern Compact (Southwestern Low-Level Radioactive Waste Disposal Compact Cal. Health & Safety Code §§ 25877-25878.4 (West Supp. 1992)), and Congress approved it in November 1988.[17] Under the Southwestern Compact, the California facility will provide LLRW disposal capacity for member states for a period of thirty years, after which another compact member state will host the regional disposal facility. Cal. Health & Safety Code § 25878, art. 4(C)(1) (West Supp. 1992).

In December 1991, DHS notified US Ecology that it had provided all information necessary for the state to reach its licensing decision on the proposed facility. DHS further stated that US Ecology's information satisfied DHS's guidance, and that DHS had completed its technical review. DHS is now in a

[16] Requirements for Land Disposal of Radioactive Waste, Title 17, Cal. Code of Regs. §§ 30489, 30493-30499 (1990).

[17] Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act, Pub. L. 100-712, 99 Stat. 4773.

position to complete its decision record and acquire the proposed facility's site from the Department of Interior, Bureau of Land Management, thus allowing the license to take effect and construction to begin.

Final action on the facility's license and acquisition of the site for the facility recently have been slowed, however, by gathering political controversy being generated by various groups which oppose the project. California's submission of an *amicus* brief in support of New York suggests that this Court's review of the Second Circuit's decision is encouraging further delays by California, presumably under a theory that invalidation of the 1985 Amendments could free the state of its obligation to construct the facility. This would allow elected representatives and appointed public health officials to avoid making a politically controversial decision. Invalidation of the 1985 Amendments might also encourage California not to develop a disposal facility since, in the absence of that law, the state could not legally ban the acceptance of waste generated in other states once the facility was in operation. Invalidation of the 1985 Amendments, or any provision relieving the states of their responsibilities for LLRW disposal, would thus create additional, and perhaps irresistible, political pressure on California officials to stop the completion of the LLRW disposal facility, even at this advanced stage of its development.

B. The Nebraska Facility Also Is Proceeding Apace

The Central Compact LLRW disposal facility is being funded jointly by US Ecology and the major LLRW generators in the five member states. Nebraska Low-Level Radioactive Waste Disposal Act, Neb. Rev. Stat. §§ 81-15,101.01; 81-15,103; 81-15,104; 81-15,113

(1990). Development of the facility is overseen by the Central Interstate Compact Commission ("CICC") through contracts with generators and US Ecology.[18] The only public funds involved in the facility are the member states' annual dues, which are used to pay for activities of the CICC representatives and their office staff.[19] The Nebraska facility is also at an advanced stage of the development process, with a completed license application now undergoing detailed review by state regulatory agencies.

III. INVALIDATION OF THE 1985 AMENDMENTS WILL RECREATE THE NATIONAL CRISIS WHICH PROMPTED PASSAGE OF THE 1980 ACT AND 1985 AMENDMENTS

New York has asked this Court to not only find that the "take title" provision of the 1985 Amendments is unconstitutional, but also to strike down the act as a whole. If the 1985 Amendments are invalidated, disposal of the nation's LLRW will be thrown into a chaotic situation worse than that which prompted the initial passage of the 1980 Act. If incentives, and disincentives, regarding the creation of new disposal capacity are removed, it is unlikely that California, Nebraska or any of the regional compact host states will complete development of any new facilities. Public opposition and political reactions

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[18] Central Interstate Low-Level Radioactive Waste Compact, Article V (c), (e), Neb. Rev. Stat. Vol. 2A, App. (BB) (1983). The Central Compact was approved by Congress in 1985. Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. 99-240, 99 Stat. 1859, 1864-1871.

[19] Central Interstate Low-Level Radioactive Waste Compact, Article IV (h) (1), Neb. Rev. Stat. Vol. 2A, App. (BB) (1983).

to such controversial projects are just too great to overcome without the federal mandate and protections afforded by the 1985 Amendments.[20] Facility developers, waste generators and certain states would not have spent hundreds of millions of dollars on development of new regional disposal facilities over the last ten years without the expectation that those facilities would, in fact, be established. Certainly, the rights of these parties likely would have to be litigated if the current policy framework and related developmental efforts are abandoned.

Invalidation of the 1985 Amendments as a whole would defeat the purpose of the interstate compacts which Congress has ratified pursuant to the 1985 Amendments. In the absence of the 1985 Amendments, the compacts could not prevent the disposal of LLRW generated in non-member states. Compact host states in particular would be disinclined to allow construction of regional facilities because they could be compelled legally to accept waste generated in *all* other states. States with existing facilities are likely to act on their previous threats in 1979 to close those facilities for the same reason. The facilities in Nevada and South Carolina currently are scheduled to close at the end of 1992,[21] and the Washington facility's intention to stay open to serve the Northwest Compact would be directly undermined by invalidation of the federal legislation.[22] In the interim,

[20] *See GAO Report* at 20 (describing public opposition to proposed facilities).

[21] *GAO Report* at 12.

[22] In March 1990, the Governor of the State of Washington stated in a letter to the Secretary of Energy:

> "I will not permit Hanford [the state's disposal facility site near Richland] to become a disposal facility for

hospitals, universities, scientific researchers and small businesses that use radioactive materials will be unable to dispose of their LLRW. They will be faced with two equally untenable choices—resorting to illegal and/or unsafe disposal methods or halting highly beneficial but waste-producing activities, at least temporarily. For some entities, this could result in going out of business altogether.[23]

There are no other good solutions to this problem. Preemptive federal legislation involving federal selection of disposal sites in specific states, over their virtually certain objections, would create a solution *least sensitive* to states' rights, and certainly would diminish local and state participation in vital matters of public concern. It also would perpetuate the current inequitable situation among the states—whereby three states are undertaking responsibility for disposal of the entire nation's LLRW—which the 1980 Act and 1985 Amendments are intended to alleviate. In contrast, interstate compacts formed by the states

> states outside of our region . . . . We in Washington State have learned that, when compelled to find solutions to nuclear waste issues, political leaders adopt responsible positions."

GAO Report at 21.

[23] Extended interim storage by waste producers is not a viable long-term solution, even assuming that space constraints and local ordinance restrictions would otherwise allow such practices. Degradation of waste containers and the waste itself raises significant public health and worker safety concerns. Siskind, Dougherty & MacKenzie, "Extended Storage of Low-Level Radioactive Waste: Potential Problem Areas," Division of Waste Management, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG/CR-4062 (December 1985), 91-102.

pursuant to the 1980 Act and 1985 Amendments provide for the equitable distribution of responsibility for LLRW disposal among member states, and in some cases specifically identify the order in which states will sequentially host facilities.[24]

An entirely federal solution also is not viable at this late hour. The federal government, through the Department of Energy, stated in 1987 that it would begin managing the disposal of LLRW classified as greater than Class C, the most hazardous category of LLRW, in 1989. The responsibility was specifically assigned to the federal government in the 1985 Amendments.[25] DOE, however, has made no significant progress in selecting sites for the disposal of this waste and now does not anticipate being able to dispose of it until the year 2010![26] While the states may be progressing less expeditiously than originally anticipated, DOE's siting efforts are considerably less advanced. This situation gives little solace that a federally implemented solution would be timely, or even workable in the long term.

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[24] For example, the Southwestern Compact provides that California will be the first host state, to be succeeded by the largest major generator state other than California, which at this time is Arizona. Cal. Health & Safety Code § 25878, art. 4(C)(1) (West Supp. 1992).

[25] 42 U.S.C. § 2021(b)(1)(D), (2)-(4).

[26] *GAO Report* at 5.

IV. THE 1980 ACT AND 1985 AMENDMENTS REPRESENT A JOINT FEDERAL/STATE SOLUTION TO THE HIGHLY-CHARGED POLITICAL PROBLEM OF LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

A. The 1985 Amendments Benefit All States

The 1980 Act and 1985 Amendments provided the states with two crucial benefits which they could not achieve in any manner other than through federal legislation—the right to form interstate compacts for LLRW disposal, and the right to exclude from regional facilities waste generated outside those compacts. A state cannot constitutionally restrict the acceptance of waste for disposal on the basis of its state of origin. *Philadelphia v. New Jersey*, 437 U.S. 617, 627-28 (1978); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630-32 (9th Cir. 1982) (state may not refuse to accept LLRW because it is generated outside the state). Nor can a state enter into a compact with another state affecting interstate commerce absent the consent of Congress. U.S. Const. art. I, § 10; *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).

In addition, the 1985 Amendments established incentives to prompt the non-sited states to act expeditiously in establishing regional and/or state facilities, and levied surcharge fees on LLRW producers in non-sited states which were paid to the sited states in exchange for their acceptance of waste from all states through December 1992. The surcharges served three purposes: (1) reimbursement of the sited states for their continued acceptance of LLRW generated outside those states; (2) application of pressure on the non-sited states, through their waste

producers who were paying the surcharges, to develop LLRW disposal solutions; and (3) defrayal of some of the cost of new facility development, through the payment of rebates comprised of a portion of the surcharge fees, to successfully progressing states who met developmental "milestones."

Under the 1985 Amendments, if a state met prescribed milestones for providing for disposal of ts LLRW, it became entitled to a rebate of twenty-five percent of the surcharge levied on waste generators for LLRW disposal at existing facilities in the three sited states.[27] States meeting the milestones used the surcharge rebates for costs related to regulation, development and construction of their own LLRW waste facilities. 42 U.S.C. § 2021e(d)(2)(E). This incentive program both rewarded the states for their timely development of LLRW disposal capacity and retained their discretion in deciding how to meet each milestone.

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[27] Those milestones for which a state would receive a surcharge rebate were as follows:

- July 1, 1986—State must join a compact or show intent to develop its own LLRW disposal facility.
- January 1, 1988—Compact must name host state and prepare siting plans.
- January 1, 1990—State must file complete application to operate a LLRW facility within the compact or state, *or* the governor must certify that the state will provide storage, disposal or management of its own LLRW by December 31, 1992.
- January 1, 1992—State must file complete application to operate a LLRW facility within the compact or state.

42 U.S.C. § 2021e(e)(1)(A)-(D).

B. The 1985 Amendments Do Not Unduly Burden The States

In addition to providing benefits to persuade the states to fulfill their responsibilities for LLRW disposal, the 1985 Amendments also include disincentives for noncompliance which may operate against both LLRW generators and the states.

Under the 1985 Amendments, LLRW generators in non-sited states must pay surcharges on waste disposed at existing sites.[28] If a state fails to meet the milestones discussed previously, the surcharges are increased in incremental amounts.[29] The most severe provision, and the one at which the petitioners direct

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[28] Those surcharge fees are as follows:

- 1986-1987—$10/cubic foot
- 1988-1989—$20/cubic foot
- 1990-1992—$40/cubic foot

42 U.S.C. § 2021e(d)(1)(A)-(C).

[29] Surcharge fees are increased based on a state's failure to meet the developmental milestones as follows:

- Failure to meet July 1, 1986 milestone—the 1986-1987 surcharge is doubled, and the non-site state generator may be denied access to an existing site after January 1, 1987.
- Failure to meet January 1, 1988 milestone—the 1988-1989 surcharge is doubled from January 1, 1988 to June 30, 1988; is quadrupled from July 1, 1988 to December 31, 1988; and the non-sited state generator may be denied access to an existing site after January 1, 1989.
- Failure to meet January 1, 1990 milestone—denial of access to an existing site.
- Failure to meet January 1, 1992 milestone—the 1990-1992 surcharge is trebled.

42 U.S.C. § 2021e(e)(2)(A)-(D).

their principal attack in this case, mandates that any state in noncompliance with the 1985 Amendments on January 1, 1996, must, at the request of an LLRW generator, take title to and possession of the LLRW generated within that state, and must also assume liability for it. 42 U.S.C. § 2021e(d)(2)(C).

This "take title" provision, however, is just one facet of the extensive array of choices on the part of the states which, when viewed in the context of the entire nationwide scheme, does not impermissibly transgress on the states' sovereignty. The burdens imposed by the "take title" provision are a fair and responsible balance to the benefits provided to the states by the 1985 Amendments.[30] Significantly, the "take title" provision is also the only disincentive in the 1985 Amendments which accrues specifically to the states. Increased disposal fees and loss of disposal facility access, for example, accrue to waste producers, not the states.

[30] If the "take title" provision were invalid, the provision that allows the states of Washington, Nevada and South Carolina to prevent importation of out-of-state LLRW to their existing LLRW facilities would effectively accomplish the original purpose of both the 1980 Act and 1985 Amendments. In the absence of out-of-state disposal facilities, each state would simply have to assume the responsibility for disposal of LLRW generated within its borders. This provision, in combination with the 1985 Amendments' provisions allowing states to form interstate regional compacts and preclude the importation of LLRW into the region, would provide the impetus for the development of new facilities. If these provisions, which clearly do not infringe on states' rights, remain in place, the 1985 Amendments would still encourage the states to continue to develop facilities already underway, even if the "take title" provision were invalidated.

Because the states are treated equally and have wide discretion in determining how to comply with the 1985 Amendments, including the ability to allocate responsibility for disposal facility development to private enterprise, the 1985 Amendments as a whole, including but not limited to the "take title" provision, do not force a state to enter into a proprietary enterprise and do not force the expenditure of monies from a state's treasury for the purpose of enforcing a federal regulatory scheme.

The 1985 Amendments represent precisely the type of "program of cooperative federalism"—least intrusive to the states and accommodating both federal and state interests—envisioned and applauded by this Court in *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. at 289. Accordingly, these laws do not impermissibly tread on state sovereignty.

C. States Traditionally Have Regulated Matters Involving Public Health And Safety, Including The Regulation Of LLRW Generation And Disposal, And Thus Are Not Required By The 1980 Act Or The 1985 Amendments To Assume A New Regulatory Responsibility

States traditionally have exercised their police powers to regulate precisely the types of activities at issue here—medical care, scientific research activities and commercial endeavors generating LLRW. State regulation of certain nuclear activities, including LLRW disposal, long has been encouraged by provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(b) (1982), which allow states to exercise responsibility over nuclear byproduct materials, source materials, and special nuclear materials in quantities insufficient to form a

critical mass. *See also* Cal. Health & Safety Code §§ 25875, 25876 (West 1984). By 1988, twenty-nine states, including New York, had entered into agreements with the Nuclear Regulatory Commission and now regulate over sixty-five percent of the nation's 20,000 licenses using these types of nuclear materials.[31] Far from imposing on states' rights, the 1985 Amendments further ensured that the states will continue to participate in and regulate this area of vital concern.

Local communities are most directly impacted by a decision to locate a LLRW disposal facility in their area. "The public is more likely to accept siting and other waste management decisions made by state government than by a more remote, less accessible federal agency." J.A. at 114a. The scheme created jointly by Congress and the states in the 1980 Act and 1985 Amendments gave states broad leeway in selecting preferable methods and locations for disposing of their LLRW. This discretion in turn provides for maximum input from local communities regarding land use and licensing decisions. This is another example of the exercise of "cooperative federalism" by which Congress provided for substantial local involvement in administering a difficult and vexing problem.

The process undertaken by US Ecology in conjunction with the State of California, with respect to siting and licensing the proposed regional facility for the Southwestern Compact, illustrates the benefits of

[31] "Regulating the Disposal of Low-Level Radioactive Waste —A Guide to the Nuclear Regulatory Commission's 10 C.F.R. Part 61," Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission (August 1989), § 5.5.1.

both state and community participation in such decisions.[32]

In 1986-87, an independent site selection Citizens Advisory Committee ("CAC") was formed to assist US Ecology in narrowing a list of eighteen desert basins in the Mojave Desert to sixteen candidate siting areas, and later three specific sites which received more detailed analysis.[33] The CAC met six times from June 1986 through January 1987, and US Ecology also held three rounds of public workshops in widespread locations to directly involve the general public in the site selection process. Using information developed at these public workshops, US Ecology in 1987 announced the selection of three sites for further study.

Following extensive environmental and technical site characterization studies, including detailed field investigations and the formation of Local Advisory Committees ("LACs") for the three candidate site areas, a location in the Ward Valley was identified as

[32] The history of the California facility's development is described in Anderson, "Disposing of Low-Level Radioactive Waste in California—A Guidebook For Citizen Participation"—(June 1990), published by the League of Women Voters, Southern California Regional Task Force.

[33] The CAC was composed of twelve citizens—two members were appointed by each Board of Supervisors of three counties under consideration for the site—Inyo, Riverside and San Bernardino; the League of Women Voters appointed three members from those counties; and the remaining three members were appointed by the Sierra Club, the Native American Heritage Commission and the California Radioactive Materials Management Forum.

the preferred site in March 1988. The selection was reached based on the results of scientific field studies and input from the four citizen advisory committees, the public, government agencies and public interest organizations. Each LAC played a key role in voicing local concerns, including assessing local impacts and suggesting ways to mitigate those impacts.

The California facility has been the subject of meaningful state, local and public participation from its inception. It is precisely this level of broad, locally-oriented participation which the concept of "cooperative federalism," embodied by Congress in the joint federal/state nature of the 1980 Act and 1985 Amendments, is intended to promote.

D. Construction Of Individual State Facilities Is Not Economically Efficient, But Might Become Necessary If The 1985 Amendments Are Invalidated

Construction and operation of LLRW disposal facilities in each state would be prohibitively expensive due to the small volumes of LLRW generated in most states. The cost to dispose of LLRW at the three existing disposal facilities has increased from approximately $10 per cubic foot to more than $80 per cubic foot in less than fifteen years. The surcharge fees established in the 1985 Amendments for disposal of LLRW at the three existing sites through December 1992 have more than doubled the cost of waste disposal for generators in non-sited states.

The substantial costs of siting and licensing a new LLRW disposal facility are largely independent of the amount of waste to be disposed. Recovery of developmental expenses, however, is based on the type

and amount of waste received. Consequently, economies of scale are a significant factor. The astronomical increase in disposal costs resulting from the construction of individual state facilities would so severely impact the most cost-sensitive LLRW generators—hospitals, universities, researchers and small businesses—that they may be forced to cease operating, curtail services or engage in unsafe and perhaps illegal disposal practices. As the National Governors' Association Task Force and Congress in the 1980 Act and 1985 Amendments concluded, a regional solution is the best method for providing for safe and efficient disposal of LLRW nationwide. J.A. at 113a. Nevertheless, if the impetus for the development of economically efficient regional facilities created by the 1985 Amendments is removed, development of uneconomical, individual state facilities might become necessary.

CONCLUSION

The 1980 Act and 1985 Amendments together provide for development of a national infrastructure for the disposal of LLRW, with the states playing a leading and highly discretionary role in providing for that infrastructure. By authorizing interstate compacts to exclude waste generated outside the compact, the federal legislation provides a strong impetus to each state to solve its LLRW disposal problem on a regional basis and in a timely manner. This approach avoids the uncertainty and inequality inherent in the current system which relies upon three existing state sites to provide disposal capacity for the remaining forty-seven states.

Moreover, there are currently only two companies in the nation which develop and operate commercial LLRW disposal facilities—US Ecology and Chem Nuclear Systems, Inc. Without a federal legislative mandate offering some assurance that the states will support construction of such controversial facilities, private industry would likely leave the field. As a recent report by the General Accounting Office graphically describes, the administrative, environmental and political requirements for constructing and operating an LLRW disposal facility, even under the 1980 Act and 1985 Amendments, are daunting.[34] If the federal legislative mandate providing the states with impetus to support the development of such facilities is removed, the magnitude of the task and the high risk of protracted regulatory approval delays and potential project failure will remove any justification or incentive for future private investment in such facilities. Furthermore, there is a substantial risk that all of the LLRW disposal facility projects currently under development pursuant to that legislation would come to a halt, and that the three existing LLRW disposal facilities will be closed by their host states.

Because the 1985 Amendments provide a joint federal/state solution to the LLRW disposal crisis

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[34] Facility development has proved more complex and time-consuming than the states originally anticipated. The process has involved the states in many legislative, administrative, programmatic, and technical matters. These have included the development of implementing legislation; the selection of facility developer; the development and implementation of site-selection and facility-development programs, including initiatives to involve the public; and the need to address public opposition and legal challenges to the development process. *GAO Report* at 17.

which is constitutionally valid, protects the public health and welfare, and is both efficient and economical, this Court should affirm the legislation's validity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

against

Petitioners,

THE UNITED STATES OF AMERICA; et. al.

Respondents,

AMERICAN COLLEGE OF NUCLEAR PHYSICIANS; AMERICAN MEDICAL ASSOCIATION; APPALACHIAN COMPACT USERS OF RADIOACTIVE ISOTOPES; CALIFORNIA RADIOACTIVE MATERIALS MANAGEMENT FORUM, INC.; EDISON ELECTRIC INSTITUTE; MALLINKRODT MEDICAL, INC.; SOCIETY OF NUCLEAR MEDICINE; et al.

Amici Curiae.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*

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INTEREST OF AMICI CURIAE

This brief[1] presents the Court with the perspective of a wide variety of generators of low-level radioactive waste ("LLRW").[2]

The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j (1988) ("1985 Act") (amending Low-Level Waste Policy Act of 1980, 42 U.S.C. §§ 2021b-2021d (1982) ("1980 Act")) established an innovative program to address a matter of national concern — assuring adequate LLRW disposal capacity. Such capacity is essential to the continued availability of the many beneficial services and products provided through the use of radioactive materials. This brief describes the serious adverse impacts that will arise if the Court invalidates either the 1985 Act as a whole or the "take title"[3] provision in particular and the national importance of preserving the 1985 Act in its entirety. *Amici* also explain their view that the 1985 Act does not improperly intrude upon the constitutionally protected sovereignty of the individual states and why its continued vitality is a matter of overriding federal interest which should outweigh any arguable imposition on state sovereignty.

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[1] In accordance with Rule 37.3 of this Court, the written consent to the filing of this brief has been received from each of the parties and has been filed with the Court.

[2] In addition to the parties named on the cover of this brief, the following companies are participating as *amici*: Arizona Public Service Company; Baltimore Gas & Electric Company; Commonwealth Edison Company; Detroit Edison Company; Duke Power Company; Duquesne Light Company; Entergy Operations, Inc.; Florida Power & Light Company; Gulf States Utilities Company; Houston Lighting & Power Company; Northern States Power Company; Pacific Gas & Electric Company; Pennsylvania Power & Light Company; Southern California Edison Company; Union Electric Company; Virginia Electric and Power Company; Wisconsin Electric Power Company; and Wisconsin Public Service Corporation.

[3] The "take title" provision states that:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the

(footnote continues)

Amici are a diverse group of private companies, public institutions, and organizations representing providers of a wide range of critical services to the citizens of the United States through the use of radioactive materials. The American Medical Association is a private, voluntary, non-profit organization of physicians. Its 280,000 members — over half of all physicians currently licensed to practice medicine — practice in all fields of medical specialization. The American College of Nuclear Physicians and the Society of Nuclear Medicine represent about 14,000 nuclear medicine physicians, scientists, technologists and radiopharmacists who utilize such radioactive materials in diagnostic, therapeutic and biomedical research applications including, among other things, detection and treatment of cancer. The Edison Electric Institute is the association of the nation's investor-owned electric utilities. Its members generate 78 percent of all electricity in the nation. The various electric utilities participating as *Amici* generate electricity for millions of residential, municipal, industrial, and commercial customers through the operation of nuclear power plants. The California Radioactive Materials Management Forum, Inc. and the Appalachian Compact Users of Radioactive Isotopes represent a wide range of industrial, medical, institutional and other users of radioactive materials. Their members include hospitals, universities, biomedical research firms, pharmaceutical manufacturers, utilities and other industrial concerns. They produce such diverse products and services as spacecraft, sheet

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(footnote continued)

> disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021e(d)(2)(C) (1988).

metal, biotechnology compounds, art authentication, cosmetics, plastics, polymers, agricultural research, radiolabeled research chemicals and computers. Finally, Mallinkrodt Medical, Inc. is a major manufacturer and distributor of radiopharmaceuticals and operates nuclear pharmacies across the United States. *Amici* generate LLRW as a byproduct of the many beneficial services they provide.

Petitioners request that the Court upset the delicate compromise of state and national interests which the 1985 Act effected, by declaring the take title provision or the entire 1985 Act unconstitutional. If the Court does find the 1985 Act unconstitutional, the substantial progress which has been achieved toward resolving the problem of LLRW disposal will be imperilled if not destroyed. In turn, the continued availability of many of the products and services provided by *Amici* will be seriously jeopardized.

The 1985 Act is working. After years in which efforts to solve the LLRW problem were essentially frustrated, the states, pursuant to the 1985 Act, are slowly but surely developing new LLRW disposal facilities. We do not suggest that the 1985 Act is perfect or that progress is being made as expeditiously or efficiently as possible. There can be significant political obstacles to the siting and operation of any new industrial facility, particularly when radioactive materials are involved. But one thing is clear — progress towards the goal established by Congress and encouraged and endorsed by the states is being achieved. That progress will be disrupted if the basic structure of the 1985 Act is invalidated as Petitioners request.

Both the 1985 Act and its predecessor, the 1980 Act, had their origins in the threatened closure of the only three privately developed and managed commercial LLRW disposal facilities in the United States. In the late 1970s, the governors of the states in which those three privately operated facilities are located (South Carolina, Washington and Nevada)

threatened to shut them down if the burdens of LLRW disposal were not more equitably shared among the states.[4] Realistically viewed, what was involved was not a problem of technology, capacity, or abrogation of responsibility by private waste generators. It was a conflict among the states — political in nature — concerning the shipment of LLRW from all of the states where it is generated to the only three states with disposal facilities. In that context, both Acts represented a resolution of that conflict originated by the states and concurred in by the federal government.

The 1980 Act assured continued availability to all LLRW generators of the three existing disposal facilities until January 1, 1986. 42 U.S.C. § 2021d(a)(2)(B) (1982). It established a federal policy encouraging states to develop additional LLRW disposal facilities and to enter into interstate compacts providing for the joint use of those disposal facilities. *Id.* § 2021d(a)(2). However, it contained only one real incentive for state action. That was the authority granted to states beginning on January 1, 1986, to restrict access to LLRW disposal facilities to generators in states that were members of interstate compacts to which Congress had consented. *Id.* § 2021d(a)(2)(B). Without that authority, states with LLRW disposal facilities could not, under the Commerce Clause of the U.S. Constitution, restrict access to their new LLRW disposal facilities.[5]

The 1980 Act represented a novel approach to a national problem. Through the use of interstate compacts, it afforded the states wide latitude in deciding how best to provide for

[4] *See* Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437, 441-43 (1987).

[5] Absent congressional authorization, a state may not discriminate on the basis of the state of origin in deciding whether to accept for disposal radioactive or other wastes. *E.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

the safe and orderly disposal of LLRW. By 1985, some progress had been made. In particular, as of that year, some thirty-seven states had enacted compact legislation.[6]

However, as the January 1, 1986 date approached, it became apparent that no new LLRW disposal facilities would be available by that time.[7] On the other hand, the member-states of the interstate compacts which utilized the three operating LLRW disposal facilities in South Carolina, Washington and Nevada were ready to take advantage of the congressionally granted authority to close their borders to LLRW produced in states outside their respective compact regions.[8] Congressional consent to those compacts would have created a national crisis by eliminating access to LLRW disposal capacity to generators in the thirty states[9] that were not members of, or eligible to join, those three compacts.

Responding to legislation introduced in Congress in 1984 to modify the 1980 Act, the National Governors' Association ("NGA") sponsored over a dozen meetings attended by "sited" and "unsited" state representatives and regional compact commission officials in an effort to achieve a state consensus on how to amend the 1980 Act.[10] After considerable deliberation and extensive compromise, a consensus was reached which again formed the basis for congressional action. The 1985 Act was adopted to prevent the impending crisis and to establish a mechanism for avoiding a similar crisis in the future.

In retrospect, the 1980 Act provided little more than a statement of policy encouraging states to join LLRW disposal compacts, and upon receipt of congressional consent, the

[6] Berkovitz, supra note 4, at 447.

[7] *Id.* at 445.

[8] *See id.* at 446.

[9] *See id.* at 447 n.50.

[10] Holmes Brown, *The Low-Level Waste Handbook: A User's Guide to the Low-Level Radioactive Waste Policy Amendments Act of 1985* iv (1986).

authority to exclude LLRW from outside their compact regions. The 1980 Act contained no other provisions effectively encouraging the development of new LLRW disposal facilities. The 1985 Act, on the other hand, established a detailed series of milestones, penalties and incentives intended to progressively encourage the development of new LLRW disposal facilities. 42 U.S.C. §§ 2021e(d)-(g) (1988). It also extended access to the three existing LLRW disposal facilities until January 1, 1993, contingent upon state compliance with the various milestones. *Id.* §§ 2021e(a),(e),(f). In order to encourage compliance with the milestones, the 1985 Act established several incentives.

First, as a condition of continued access to the three existing LLRW disposal facilities, the 1985 Act required LLRW generators to pay escalating surcharges to the three states in which the operating LLRW disposal facilities were located. *Id.* § 2021e(d)(1). If the state or compact region in which the generator was located met a milestone, a portion of those surcharges paid by the generators would be paid to that state or to the compact commission to facilitate their disposal facility development efforts. *Id.* § 2021e(d)(2). Failure to meet such milestones would result in generators in the non-complying state or compact being subjected to increasing "penalty" surcharges and/or actual denial of access to the existing LLRW disposal facilities prior to January 1, 1993. *Id.* § 2021e(e)(2).

Since 1985, commercial LLRW generators have been penalized for the failure of their states or regions to meet the milestones, while complying states and regions have been

rewarded. To date, LLRW generators have paid approximately $125 million in LLRW disposal surcharges[11] and generators in the States of Michigan, New Hampshire, Vermont and Rhode Island and in the District of Columbia and Puerto Rico have been denied access to the existing LLRW disposal facilities.[12] No direct consequence has been imposed on the states themselves.

Beginning on January 1, 1993, states with operating disposal facilities may deny access to those facilities to any generators outside their respective compact regions. 42 U.S.C. § 2021e(d)(2)(C) (1988). Thus, failure of their states to provide access to an operating facility by that time could result in LLRW generators being denied access to disposal capacity.

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[11] The figure is calculated from the base surcharges set forth in section 2021e(d)(1) of the 1985 Act and volumes of LLRW shipped for disposal from all states outside of the three sited compact regions between 1986 and 1991. See National Low-Level Waste Program, U.S. Department of Energy, State-by-State Assessment of Low-Level Radioactive Wastes Received at Commercial Disposal Sites (Sept. 1990) for volumes generated between 1986 and 1990. See *LLRW Disposal Update*, The Radioactive Exchange, Nov. 27, 1991 at 14-15 for 1991 volumes.

[12] *See* 1990 U.S. Department of Energy Annual Report on Low-Level Radioactive Waste Management Progress at ix ("1990 DOE Annual Report"). Under separate contracts between New Hampshire, Rhode Island and the District of Columbia and the Rocky Mountain Low-Level Radioactive Waste Compact, LLRW from these states is temporarily being shipped for disposal to the disposal facility in Nevada. 1989 U.S. Department of Energy Annual Report on Low-Level Radioactive Waste Management Progress at vii.

However, even in 1993, if a state has failed to assure availability of disposal capacity, it is not required to take title and possession of LLRW generated within its borders.[13]

Thus, under the 1985 Act, it is not until January 1, 1996 (fifteen years after passage of the 1980 Act and eleven years after passage of the 1985 Act) that *any* direct consequence is applied to states that have failed to provide for LLRW disposal capacity. 42 U.S.C. § 2021e(e)(2)(C) (1988). That consequence, at issue in this case, is the provision requiring such states to accept title and possession, or upon failure to take possession, assume liability for LLRW generated within their borders. *Id.*

This graduated incentive and penalty process has produced significant progress. Forty-two states are members of nine compacts.[14] Several states plan to develop their own intrastate disposal facilities and compact host states have been selected.[15] Detailed license applications have been submitted for new disposal facilities in several states.[16] This level of progress should not be underestimated. Siting of any

[13] Under the 1985 Act, a state that does not provide access to an operational disposal facility by January 1, 1993 has the option either to take title to all LLRW generated within its borders or rebate to the generators twenty-five percent of the surcharges collected from such generators between January 1, 1990 and December 31, 1992 to which the state would be otherwise entitled. *See* 42 U.S.C. § 2021e(d)(2)(C) (1988). Since states may charge generators for the costs of developing the new disposal sites, rebating twenty-five percent of the surcharges to the generators will not hinder a state's development of a disposal facility. States will, nevertheless, be able to recoup the costs of facility development from the LLRW generators. Indeed, New York requires LLRW generators to finance "all costs and expenses" of siting, developing, licensing, constructing, operating and maintaining a disposal facility. *See* N.Y. Pub. Auth. Law §§ 1854-d.2.1.a.-b. (McKinney Supp. 1992).

[14] *See LLRW Disposal Update*, *supra* note 11, at 14-15.

[15] *See* 1990 DOE Annual Report, *supra* note 12, at viii.

[16] *Id.*

nuclear facility is a difficult task, particularly with the prevalence of the "not in my backyard", or "NIMBY", attitude of many individuals.

If the 1985 Act is invalidated, the progress to date will be imperilled if not destroyed. That progress has occurred as a result of the detailed, negotiated compromises reached in the individual regional compacts and the potential impact of the take title provision. An essential component of those compromises is the authority of each of the compact regions to exclude out-of-region LLRW once their facilities are developed. However, if the 1985 Act is overturned, the congressionally granted authority of compact regions to deny access to out-of-region LLRW likely will be eliminated.[17]

Without that exclusionary authority, the incentive for states to continue to develop new disposal facilities will be significantly reduced.[18] Under such circumstances the three states which now host operating disposal facilities will be

[17] The 1985 Act specifies that the authority of a compact to exclude out-of-region LLRW "shall not take effect" until Congress consents to the compact. 42 U.S.C. § 2021d(c) (1988). In the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, § 201, 99 Stat. 1859 (1986), Congress consented to seven compacts. However, such consent was explicitly granted "subject to the provisions of the [1985 Act]." *Id.* § 212, 99 Stat. at 1860. Subsequently, Congress consented to two more compacts with similar conditions. *See* Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub. L. No. 100-319, § 1, 102 Stat. 471 (1988); Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act, Pub. L. No. 100-712, § 1, 102 Stat. 4773 (1988).

[18] For example, the California Department of Health Services recently informed the developer of the planned Southwestern Low-Level Radioactive Waste Disposal Compact disposal facility in California that "[s]ufficient information is now available . . . to make a licensing decision and complete the environmental review, including all necessary findings and support documentation." Letter from Don J. Womeldorf, Chief Environmental Management Branch, California Department of Health Services, to Stephen A. Romano, Vice President,

(footnote continues)

faced with the hard choice of either closing those facilities or making them available to all LLRW generators — the very choice they confronted in 1980 and 1985.

Loss of access to LLRW disposal facilities will jeopardize the continued availability of many of the beneficial products and services provided by *Amici* and thus raises the problem to one of vital federal interest. As described on p. 28 infra, through the provisions of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, *et seq.*, as amended (1988), Congress has clearly articulated the strong federal interest in assuring the full development and peaceful uses of radioactive materials. The uses include the products and services provided by *Amici.*

The uses of radioactive materials in our society are widespread. A small sample of their diverse applications includes medicine, biomedical research, energy production, mineral exploration, airport security, nondestructive examination of pipes and welds, pest eradication, breeding of new seed varieties, and archeological dating.[19]

In the field of biomedical research, radioactive materials are used in a wide range of applications including cell biology, molecular biology, neurobiology, genetics research, cancer research and Acquired Immune Deficiency Syndrome

(footnote continued)

U.S. Ecology, Inc. (Dec. 26, 1991). However, the Director of the California Department of Health Services also recently indicated that California will probably wait for a decision from the Court in this case before undertaking any additional major efforts toward opening that facility. Nuclear Regulatory Commission, *Weekly Information Report — Week Ending January 24, 1992,* Enclosure Q at 7 (Jan. 30, 1992).

[19] Anne Bisconti & Robert Livingston, *Let's Talk About Radiation,* Nuclear Industry, Fourth Quarter 1991, at 38, 39.

("AIDS") research.[20] In New York, 30-40 percent of the total annual volume of LLRW generated is produced by biomedical research activities.[21] The carbon-14 and hydrogen-3 isotopes are used extensively in biomedical research. Their half-lives are approximately 5,700 years and 12.5 years respectively.[22] Isotopes with such long half-lives cannot be conveniently stored for radioactive decay at most biomedical research facilities. They are frequently contained in high volume wastes, such as animal carcasses, that are difficult to store for long periods of time and that would quickly fill up available freezer capacity.[23] To expand storage capacity, even if possible, will divert resources from critical research activities.

In the nuclear medicine field, about 12 million diagnostic procedures, 50,000 therapeutic procedures and 100 million laboratory tests are performed in the United States annually using radioactive materials which must be disposed of in accordance with federal regulations.[24] Denial of access to disposal capacity will impede the availability of these procedures.[25] Indeed, in Michigan (which has been denied access to the three operating disposal facilities) nuclear

[20] Gordon I. Kaye, Ph.D., *The Crisis in LLRW Disposal: Short- and Long-Term Effects on the Biomedical Community,* XIX The Health Physics Soc'y Newsl. 1 (Sept. 1991); *see also Low-Level Radioactive Waste Regulation — Science, Politics and Fear* 112 (Michael E. Burns ed., 1988).

[21] Kaye, *supra* note 20, at 1.

[22] *Id.* at 4.

[23] *Id.*

[24] Carol S. Marcus, Ph.D, M.D., *Why We Need a Low-Level Radioactive Waste Site,* 43 ACURI — A Newsletter for Appalachian Compact Users of Radioactive Isotopes 1 (Jan. 1992); *see also* Burns, *supra* note 20, at 109-12.

[25] *Low-Level Waste Legislation: Hearings on H.R. 862, H.R. 1046, H.R. 1083 and H.R. 1267 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs,* 99th Cong., 1st Sess. 341-43 (Mar. 7-8, 1985) (statement of Robert E. Henkin, M.D. and William H. Briner).

medicine procedures at at least one hospital have been curtailed due to the absence of necessary LLRW storage space.[26] In addition, the production of radioactive materials used in nuclear medicine generates large amounts of LLRW that require disposal.[27] Unavailability of disposal capacity thus will likely result in cutbacks in or even cessation of nuclear medicine activities and patient care and use of higher risk and more expensive technology.[28]

The commercial nuclear power industry is also affected by the availability of LLRW disposal capacity. Commercial nuclear power plants were not intended to serve as long-term LLRW storage repositories and may not be licensable for long-term storage. While it is possible to establish additional interim onsite storage capacity and some utilities are doing this, Nuclear Regulatory Commission ("NRC") policies discourage onsite storage. The NRC has made clear that "use of on-site storage should be considered an option of last resort" and strongly favors permanent disposal.[29]

Even if only the take title provision of the 1985 Act is overturned and the balance of the 1985 Act is preserved, similar adverse results are likely to occur. In that event, presumably the provisions of the 1985 Act authorizing states to exclude out-of-region LLRW would remain intact, and the three existing "host" states would be permitted to exercise that authority and exclude LLRW generators from outside

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[26] Anita Warren, *Radiation Phobia: It Could Be Hazardous to Your Health*, Nuclear Industry, Third Quarter 1991, at 18, 29.

[27] Burns, *supra* note 20, at 111.

[28] *Management Compacts on Low-Level Radioactive Waste: Hearing on S. 44, S. 356, and S. 442 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 226-27 (Mar. 8, 1985) (statement of Robert E. Henkin, M.D.).

[29] Memorandum from Samuel J. Chilk, NRC Secretary, to James M. Taylor, NRC Executive Director for Operations, on SECY-91-306 — Analysis of Comments Received on Title-Transfer and Possession Provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 at 1 (Jan. 30, 1992).

their respective regions. At the same time, loss of the most meaningful incentive for state progress in developing new disposal facilities — the take title provision — will seriously impede disposal facility development efforts elsewhere.

Furthermore, as described above, virtually all of the 1985 Act incentives and penalties (surcharges and denials of disposal facility access) are imposed on the LLRW generators not upon the states, yet the generators do not control the disposal facility development process. If the hard work of actually licensing and building new disposal facilities is to come to a successful conclusion, it is essential that states have meaningful incentives to further progress — as Congress intended.

SUMMARY OF ARGUMENT

The 1985 Act should be upheld and the decision below affirmed, whether based upon the principles enunciated in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985), or upon the view that the Tenth Amendment provides the states with more expansive substantive protection against congressional action under the Commerce Clause.

There was no defect in the national political process that resulted in passage of the 1985 Act. To the contrary, the 1985 Act represents an unusual example of federal-state cooperation. Furthermore, the 1985 Act clearly does not jeopardize the constitutional equality of the states.

The 1985 Act does not undermine or unduly impair the essentials of state sovereignty. Instead, it effectuates the states' desire that they be responsible for assuring sufficient disposal capacity for LLRW generated within their borders. In addition, the 1985 Act leaves to the states significant choices concerning how to carry out the task which they volunteered to undertake.

The 1985 Act has minimal adverse impacts on the states and in no way infringes on state sovereignty. Virtually all of those impacts, such as surcharges and denial of access to disposal facilities, are imposed upon the waste generators, not upon the states. Only after 1995, ten years after the passage of the 1985 Act, are such impacts (in the form of the take title provision) imposed upon the states. However, this will occur only for those states that fail to provide disposal facilities in fulfillment of the responsibility sought by the states themselves. Moreover, even if a state is required to take title to LLRW, its essential authority to govern remains intact.

While Petitioners implicitly agree that federal action which might otherwise violate the Tenth Amendment will not be invalidated if agreed to by the affected states, they argue that endorsements by state congressional delegations and organizations representing the states do not evidence such acquiescence. However, we are aware of no authority which holds that such acquiescence can only be manifested by some formal state action, *e.g.*, by its legislature or governor, or both. Rather, it should be ascertained in a realistic and practical manner, by considering the actions of the states' representatives in Congress, the positions of organizations representing the states or their officials, and state activity designed to implement the allegedly offending federal legislation. All of those factors show that New York acquiesced in the 1985 Act.

Finally, the 1985 Act was adopted to avert a nationwide disposal crisis that threatened critical services relating to health and commerce. It is achieving the results intended and is doing so in a manner that is not destructive of state sovereignty. In such circumstances, the minimal, if any, "state submission" to federal authority is constitutionally justified.

ARGUMENT

The grant of the petition in this case suggests that the Court may revisit the standard set forth in *Garcia* upon which the decisions below were based. However, under any test of state sovereignty under the Tenth Amendment, the 1985 Act should be recognized as a unique example of voluntary cooperation between the states and the federal government on a matter of considerable national interest, *i.e.*, the development of the peaceful uses of nuclear energy. *See* Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, *et seq.*, as amended (1988); *see also English v. General Elec. Co.*, 110 S. Ct. 2270, 2276-77 (1990); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

Therefore, Petitioners' claims that state sovereignty has been thwarted must be evaluated not only in light of the Tenth Amendment, but also in light of the reasonable means chosen by both the states and Congress to forge an acceptable solution to a matter of fundamental federal interest. Under that compromise, the states through compacts have obtained permission to exclude LLRW from outside their borders. In return they have assumed the responsibility to establish regional disposal facilities for waste generated within their borders, and under certain circumstances, to take title to that waste if such facilities are not operating by 1996.

It is in the context of this rare example of cooperative federalism that Petitioners challenge the application of the *Garcia* test by the courts below. Accordingly, we first argue that if the *Garcia* test is applied here, the decisions below should be upheld. Second, we argue that even if this Court decides to modify *Garcia* significantly, the 1985 Act, including the take title provision, should be upheld.

I.

WHEN REVIEWED AGAINST *GARCIA*, THE 1985 ACT INCLUDING THE TAKE TITLE PROVISION FULLY COMPORTS WITH THE TENTH AMENDMENT

The *Garcia* Court held that states must look to the federal political process to protect them against undue congressional encroachment. The *Garcia* Court recognized that:

> the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these [*Garcia*] cases the internal safeguards of the political process have performed as intended.

Garcia, 469 U.S. at 556. Three years later, this Court in *South Carolina v. Baker*, 485 U.S. 505, *reh'g denied*, 486 U.S. 1062 (1988), reaffirmed *Garcia*, holding that there was no infringement on state sovereignty where there had been no "extraordinary defect" in the political process that led to the enactment of the law. *Id.* at 512.

Although primarily limiting judicial review to an examination of the political process, the Court in *Garcia* indicated that additional limits might exist on congressional action, referring to *Coyle v. Oklahoma*, 221 U.S. 559 (1911). In *Coyle*, the Court stated:

> the *constitutional equality of the States is essential* to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Coyle, 221 U.S. at 580 (emphasis added).

Thus, *Garcia*, *Baker* and *Coyle* allow judicial interdiction of federal powers only when (1) that power is a result of an extraordinary defect in the political process and (2) when the constitutional equality among the states has been jeopardized. If this test is applied, as we submit it should be, the decisions below should be affirmed. Neither the 1985 Act as a whole, nor the take title provision separately, exceed these limits on congressional action.

That there was no defect in the national political process surrounding the enactment of the 1985 Act is clear. The passage of the 1985 Act represents a model of cooperation and compromise among states with varied interests and the federal government that rarely has been achieved. The states had ample opportunity, and New York in particular utilized that opportunity, to participate in the legislative process. Neither New York nor any other state was left "politically isolated and powerless" by the passage of the 1985 Act. *Baker*, 485 U.S. at 513. Nor was any state "deprived of any right to participate in the national political process." *Id.* at 512-13. Indeed, although not needed to avoid a defect in the political process, New York's representatives in Congress fully supported the passage of the 1985 Act, including the take title provision.

The 1985 Act, like the 1980 Act, evolved from the specific proposals of the states themselves as articulated by, among others, the NGA. As one commenter noted, the states "volunteered their services . . . to join in a cooperative federal-state campaign to find adequate waste disposal sites. This extensive state involvement produced substantial benefits for

all the states, strongly suggesting that state sovereignty received adequate protection."[30]

The states were also afforded a full opportunity to participate in the legislative process and New York fully participated in and supported the passage of the 1985 Act. Before the House Subcommittee on Energy and the Environment, Mr. Charles R. Guinn, Deputy Commissioner for Policy & Planning, New York State Energy Office, testified that New York was participating with the NGA to build a state consensus and supported the principle that the 1985 Act include "[a]ppropriate penalties . . . for failure to meet the [designated] milestones."[31] In addition, Senator Moynihan of New York, who served on the Senate Environment and Public Works Committee which devised the take title provision, stated on the eve of the 1985 Act's passage, that the 1985 Act, including the take title provision, "is indeed an equitable approach for all concerned, and I am pleased to support it."[32]

Here, the history of the passage of the 1985 Act indicates that the "internal safeguards of the political process have performed as intended." *Garcia*, 469 U.S. at 556. Indeed, the record shows a degree of state involvement and support for the 1985 Act which goes far beyond the minimum necessary to demonstrate that the political process had properly functioned.

Neither does the 1985 Act jeopardize the constitutional equality among the states in contravention of *Coyle*. As demonstrated above, review of the legislative history shows that the 1985 Act represents the culmination of the states' efforts to devise a workable structure for assuring an equitable distribution of benefits and burdens among the states. Under the 1985 Act, each state assumes responsibility for assuring the availability of LLRW disposal capacity within

[30] Berkovitz, *supra* note 4, at 473-74.

[31] Hearings, *supra* note 25, at 197-98 (statement of Charles R. Guinn).

[32] 131 Cong. Rec. S18,121 (daily ed. Dec. 19, 1985).

the state. Each state is equally free to devise how it will carry out its responsibility. Every state failing to make sufficient progress toward the development of new disposal facilities incurs consequences for its generators, and perhaps, ultimately for itself through the take title provision.[33]

Therefore, since the 1985 Act does not jeopardize constitutional equality among the states, and since it is not the product of a defect in the political process, it falls within the limits on congressional action set forth in *Garcia* and *Baker*. Accordingly, there has been no violation of the Tenth Amendment.

II.

EVEN IF THIS COURT FOLLOWS A SUBSTANTIVE TEST, THE 1985 ACT INCLUDING THE TAKE TITLE PROVISION IS CONSTITUTIONAL

Petitioners have suggested that whether or not *Garcia* is modified, this Court should undertake "substantive Tenth Amendment review" of the 1985 Act and, pursuant to such review, declare the 1985 Act unconstitutional. NYS Br. at 9; *see also* Cortland Br. at 7-8; Allegany Br. at 8-9. If the Court applies such a test, it nevertheless should hold that the 1985 Act is constitutional.

We assume that any such test will be based upon the fundamental principle that states have certain sovereign powers in our federal system that must be protected by the judiciary through affirmative limits on federal regulation.[34]

[33] In any event, even where, unlike here, Congress enacts legislation which results in the imposition of unique burdens on a particular state, that consequence alone does not make the legislation constitutionally infirm.

[34] Petitioners suggest that this Court return to a test which embodies this principle. NYS Br. at 9-10; Cortland Br. at 7-8; Allegany Br. at 8-9, 15-16.

Indeed, this concept of state sovereignty became the foundation for the test that was developed in the post-*National League of Cities v. Usery*, 426 U.S. 833 (1977) jurisprudence, and was supported by all the dissenting Justices in *Garcia*.[35]

In *National League of Cities*, this Court described the principle of state sovereignty in the following manner:

> [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

National League of Cities, 426 U.S. at 845. The majority's primary concern was that the imposition of certain federal regulations on state governments might, if left unchecked, allow "the National Government [to] devour the essentials of state sovereignty . . . ." It [the Court] therefore drew from the Tenth Amendment an "affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce power affirmative limitations contained in the Constitution."

Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 236 (1983) (quoting *National League of Cities*, 426 U.S. at 855, 841).

Petitioners argue that the 1985 Act is unconstitutional because it "totally undermines the existence of states as independent sovereign entities." NYS Br. at 9; *see also* Cortland Br. at 19; Allegany Br. at 9. On the contrary, the 1985 Act not only allows the states to function as separate and independent entities, but it in no way infringes upon the states' essential authority to govern. The Act preserves the basic principle of federalism that was articulated in *National League of Cities*

[35] *Garcia*, 469 U.S. at 573-74 (Powell, J., dissenting); *Id.* at 579 (Rehnquist, J., dissenting); *Id.* at 582 (O'Connor, J., dissenting).

and its progeny. *Amici* believe that the following principles would be relevant to any substantive evaluation of the 1985 Act.

1. The 1985 Act leaves the states with the authority to make fundamental decisions.

Petitioners state that:

> at least two features . . . have repeatedly been the focus of review of federal action under the Commerce Clause by the Court: (1) the ability of state governments to make independent policy choices about whether to engage in state government activities, and (2) the power of state governments to enact or decline to enact legislation.

NYS Br. at 15; *see also* Cortland Br. at 14-17; Allegany Br. at 11. Petitioners argue that the 1985 Act "commandeered the States' sovereign authority . . . and deprived the States of any independent opportunity to decide whether to participate in such a federally mandated program." NYS Br. at 9; *see also* Cortland Br. at 17-19; Allegany Br. at 15. Based on this argument, Petitioners conclude that the 1985 Act "differs materially from all federal actions previously reviewed by the Court under the Tenth Amendment." NYS Br. at 9; *see also* Cortland Br. at 19.

We disagree for several reasons. First, the states, including New York, played an integral role in the decisionmaking process that shaped the 1980 and 1985 Acts. Indeed, the fundamental element of the legislation was adopted from the NGA's specific recommendations.[36]

That element, the assignment of responsibility to the states for the disposal of LLRW generated within their borders, represented Congress' effectuation of the *states'* own

[36] The NGA's most recent policies continue to reflect support for the legislation. In particular, in its 1991-92 "Policy Positions Paper", the NGA states:

(footnote continues)

desire not to be subject to a federally imposed solution to the LLRW disposal problem. In essence, by enacting the 1985 Act, Congress acceded to the states' wishes.

Second, the 1985 Act leaves virtually all of the decisions on how the states should carry out that responsibility to the individual states. There is no federally mandated program and no obligation to enact any particular state legislative program. States may or may not enter into regional compacts to provide for the establishment of regional LLRW disposal facilities, may contract with compact commissions for access to regional disposal facilities, may build their own facilities using a state agency or by contracting with a private sector developer, or may invite or otherwise encourage the private sector to provide disposal capacity within the state. Congress has dictated neither the number, the location, the size, the design, nor the accessibility of such disposal facilities.

Nothing in the 1985 Act compelled New York to comply with the 1985 Act's provisions in the manner it chose. Rather than join a compact (as forty-three other states have done), New York chose to build its own intrastate facility. *See* N.Y. Pub. Auth. Law § 1854-c.3. (McKinney Supp. 1992). Rather than leave disposal facility site selection to private developers as others have done, New York adopted legislation establishing site selection standards and a public authorities control board to select a disposal site. *See* N.Y. Pub. Auth. Law §§ 50, 1854-c. (McKinney & McKinney Supp. 1992). Rather than

---

(footnote continued)

> National inaction regarding the creation of additional storage capacity threatens to halt or seriously curtail medical research and diagnostic activities critical to the public health and welfare. Every community in this nation will be affected if it becomes more difficult to reap the benefits of nuclear medicine.
>
> Therefore, . . . [e]ach state should accept primary responsibility for the safe disposal of low-level waste generated within its borders . . . .

National Governors' Association, 1991-92 Nuclear Energy Policy, Committee on Energy and Environment, §§ 13.3.1-13.3.2.

retain a private contractor to construct the facility, New York provided for construction by a state agency. *See* N.Y. Pub. Auth. Law, § 1854-c.3. (McKinney Supp. 1992). Rather than have the NRC regulate the operation of the facility, New York chose to regulate it itself. *See* N.Y. Envtl. Conserv. Law §§ 29-0301 to -0305, 29-0501 to -0503 (McKinney Supp. 1992). Under New York law, *all* costs of these activities are passed onto the LLRW generators in the State. N.Y. Pub. Auth. Law §§ 1854-d.2.a.b. (McKinney Supp. 1992).

In short, Petitioners greatly exaggerate the extent to which the 1985 Act intrudes upon their ability to make choices and exercise their sovereign powers. Contrary to New York's assertions, Congress hardly acted by "congressional fiat and without regard for current or past state desire or practice." NYS Br. at 21-22. The 1985 Act leaves states with wide discretion in deciding how to carry out their responsibilities under the 1985 Act. Very little of what New York has chosen to do was compelled by the requirements of the 1985 Act. Clearly, the 1985 Act "establishes a program of cooperative federalism that allows the States . . . to enact and administer their own regulatory programs, structured to meet their own particular needs." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 767, *reh'g denied*, 458 U.S. 1131 (1982) (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981)).

2. The 1985 Act has minimal adverse impacts on the states.

In *National League of Cities* and its progeny, this Court was concerned with the potential impacts of a federal statute on a state's ability to "structure operations and set priorities" in the matter of governance. *See EEOC*, 460 U.S. at 240 (citing *National League of Cities*, 426 U.S. at 849-50.) In *National League of Cities*, the Court stated that federal control of the terms and conditions of state employment "displaces state policies regarding the manner in which [states] will structure delivery of those governmental services which

their citizens require." *National League of Cities*, 426 U.S. at 847. The most visible effect that the Court identified was financial — "forcing the States to pay their workers a minimum wage and an overtime rate would leave them with less money for other vital state programs." *EEOC*, 460 U.S. at 240 (citing *National League of Cities*, 426 U.S. at 846-47); *see also Hodel*, 452 U.S. at 292 n.33.

Petitioners argue that the 1985 Act is different than other statutes previously reviewed by the Court because it uniquely imposes burdens upon state governments. NYS Br. at 19-20; Cortland Br. at 23. Contrary to Petitioners' contention, however, the adverse impacts on the states from implementing the 1985 Act are minimal. Virtually all of the 1985 Act's penalties (surcharges and denial of access to disposal facilities) are imposed on LLRW generators, and not on the states. When a state fails to meet any of the milestones prior to 1993, the *generators* in that state are subject to surcharges and/or denial of access to the three existing regional disposal facilities. 42 U.S.C. § 2021e(d) (1988). Prior to 1993, no direct consequences are imposed on the states.

Beginning in 1993, if a state has failed to provide necessary disposal capacity, the only consequence that is likely to be incurred is that the state must rebate to generators a portion of the funds which the generators have paid as disposal surcharges. The state will be affected only to the extent that the rebated funds will not be available to the state for facility development. *See id.* § 2021e(d)(2)(C). (For a more detailed discussion, see pp. 5-8 supra.).

In addition, the 1985 Act allows cost-shifting onto generators for the development of regional or state disposal facilities. The New York legislature, in particular, has required generators within the state to pay for *all* costs associated with the development of the State's disposal facility. N.Y. Pub. Auth. Law §§ 1854-d.2.a.-b. Pursuant to this legislation, New

York has collected, to date, more than $41 million from the it's investor-owned and public utilities.[37]

Only when a state or compact region fails to provide for the disposal of LLRW generated within the state or compact region by January 1, 1996 (fifteen years after passage of the 1980 Act and ten years after passage of the 1985 Act), are direct consequences imposed on it through the take title provision. New York suggests that that provision goes beyond more traditional congressional responses to state inaction in areas of federal interest, such as the withholding of federal funds for a state's failure to regulate travel speed on public highways. In such cases, "States are left with the choice of whether state interests advanced by such funding outweigh the burden upon the state governmental structure in fulfilling the federal regulatory functions imposed upon it." NYS Br. at 26.

The choices offered the states under the 1985 Act are no different. If a state chooses not to use its governmental machinery to develop a LLRW disposal facility or cooperate with other states to do the same, then that state becomes liable for costs associated with the state's failure to act. As in the case of the withholding of federal funds, the net result is a financial burden on those states which have elected not to further a particular federal interest.

To be sure, the siting of a LLRW disposal facility, much like other industrial or commercial facilities, is a politically controversial task, and a state that undertakes such an effort will be subjected to strong pressure from groups who may oppose such a facility. However, it is self-contradictory to argue that the Tenth Amendment is a shield for state sovereignty and, in the same breath, that it insulates the states from the burdens that go with the exercise of that sovereignty.

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[37] This figure is obtained by totalling the amounts reflected in the New York Research and Development Authority invoices. *See* Brief for Defendant-Appellees, Nos. 91-6031, 91-6033 & 91-6035 at 19 (2d Cir. filed Apr. 15, 1990).

3. New York acquiesced in the 1985 Act.

Moreover, Petitioners at least implicitly concede that federal action which might otherwise violate the Tenth Amendment will be permissible where a state is in agreement with it.[38] According to Petitioners, however, the endorsement of the 1985 Act by state congressional delegations and organizations representative of the states was insufficient to demonstrate New York's willingness to participate in the federal scheme. NYS Br. at 27. Yet Petitioners never describe what exactly would be sufficient evidence of a state's agreement to a federal program.

Given the complex nature of both our federal and state systems, it is unrealistic to expect that whenever a federal statute affects state functions or responsibilities in a manner which might be constitutionally suspect without state acquiescence, that acquiescence can only be manifested by formal action of a state's legislature or its governor, or both. Rather, a state's acquiescence should also be ascertained in a practical manner on the basis of the actions taken by the state and its representatives, including those elected to Congress.

This realistic view of federal-state relations has been applied in a closely related area. Thus, when Congress granted its consent to the various regional LLRW disposal compacts, it did so subject to various conditions. Under the Commerce Clause of the U.S. Constitution, compact member-states accept or consent to those conditions by acting under them and proceeding to implement the compact. No formal state reratification is required.[39]

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[38] "[P]ermissible federal mandates to States as sovereigns were always linked to a State's willing participation in the particular activity involved." NYS Br. at 19; *see also* Cortland Br. at 7; Allegany Br. at 15.

[39] *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 281-82 (1959); *Concerned Citizens of Nebraska v. NRC*, No. CV90-L-70, slip op. at 6 (D. Neb. Oct. 19, 1990), *appeal docketed*, No. 91-2784 NEL (8th Cir. Apr. 22, 1991).

While New York has chosen not to join a compact, the situation is, nevertheless, analogous. If New York's support of the 1985 Act through the various state representative organizations, through its elected congressional representatives, and through its state officials is not enough to demonstrate the state's willingness to participate in the federal scheme, its subsequent efforts to implement the 1985 Act should be.[40] Soon after passage of the 1985 Act, New York enacted legislation providing for the siting and financing of a LLRW disposal facility. In addition, New York's LLRW legislation created a commission and an advisory committee to decide on disposal sites and methods, and assigned various new responsibilities to state agencies with regulatory authority over nuclear activities.[41] In 1988, New York initiated the siting process mandated by the 1986 legislation.

Thus, New York in fact consented to the 1985 Act and began to implement it. That New York has, in essence, now "changed its mind" does not cause the 1985 Act to be destructive of state sovereignty.

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[40] In July 1990, the New York state legislature appears to have expressed its disagreement with the take title provision by adopting the following legislation:

> [t]itle to any low-level radioactive waste shall at all times remain in the generator of such waste, including the period following acceptance of such waste by the authority at the permanent disposal facilities.

N.Y. Pub. Auth. Law § 1854-d.6. (McKinney Supp. 1992). This legislative attempt by the State to overcome its obligation to take title to waste generated in New York is not only contrary to the provisions of the 1985 Act, as the State freely admits (NYS Br. at 29 n.18), but also directly contravenes the State's pledge to the federal district court that New York "intends to go forward and continue to comply with the Act pending developments in this lawsuit." Complaint ¶ 31 (*see* Joint Appendix at 19a).

[41] N.Y. Envtl. Conserv. Law §§ 29-0301 to -0305, 29-0501 to -0503 (McKinney Supp. 1992).

4. The nature of the federal interest advanced in the 1985 Act justifies state submission.

This Court has consistently recognized that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Hodel*, 452 U.S. at 288 n.29 (citing *National League of Cities*, 426 U.S. at 852-53); *see also FERC*, 456 U.S. at 764 n.28.[42] As discussed on pp. 3-5 supra, Congress enacted the 1980 Act and the 1985 Act in order to avert national disposal crises that threatened critical medical, research, energy and other services. It is those very services which Congress intended to encourage when it stated that:

> It is . . . the policy of the United States that . . . the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, . . . [and that radioactive] material affect[s] interstate . . . commerce and must be regulated in the national interest.

42 U.S.C. §§ 2011, 2012(c) (1988). Because of the need to assure the continued availability of those services, there is an overriding national interest in assuring adequate LLRW disposal capacity. This overriding interest is sufficient to outweigh any adverse impact that the 1985 Act arguably may have on state sovereignty. Further, while the circumstances in which "state submission" is justified have not been defined with precision, the potential for such a national disposal crisis, the unusual federal-state cooperative program developed to prevent it, and the minimal impact on the states' essential governmental functions, strongly suggest that what is presented by this case represents a circumstance in which state submission is appropriate.

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[42] The dissenting opinion in *Garcia* reiterated this view, interpreting *National League of Cities* and its progeny as contemplating that an overriding federal interest might, in certain circumstances, outweigh the state interest in autonomy. *Garcia*, 469 U.S. at 562-64 (Powell, J., dissenting); *Id.* at 588 (O'Connor, J., dissenting). *But see Id.* at 579 (Rehnquist, J., dissenting).

III.
CONCLUSION

The 1985 Act should be held to be constitutional in its entirety and the decision below affirmed.

Dated: Washington, D.C.
March 4, 1992

Respectfully submitted,

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Nos. 91-543, 91-558, and 91-563

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK,
Petitioner,
v.
THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

COUNTY OF ALLEGANY,
Petitioner,
v.
THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

COUNTY OF CORTLAND,
Petitioner,
v.
THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF ROCKY MOUNTAIN LOW-LEVEL RADIOACTIVE WASTE COMPACT, NORTHWEST INTERSTATE COMPACT ON LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT, AND SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the various provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which ratify and implement the unanimous agreement of the several States regionally to resolve longstanding interstate disputes with respect to low-level radioactive waste disposal policies, are consistent with fundamental principles of federalism.

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INTEREST OF *AMICI CURIAE*

The Rocky Mountain Low-Level Radioactive Waste Compact, the Northwest Interstate Compact on Low-Level Radioactive Waste Management, and the Southeast Interstate Low-Level Radioactive Waste Management Compact (collectively, the "Compacts") are three of the nine interstate compacts organized by the States and authorized by Congress to supervise State and regional low-level radioactive waste ("LLRW") disposal.[1] For political and economic reasons discussed in detail herein, LLRW disposal has been the subject of a number of serious interstate disputes. The Compacts are the embodiments of the regional solution of those disputes crafted by the States themselves in 1980 and 1985 compromises, the latter of which was ratified by Congress in the challenged legislation. The Compacts believe that their regional perspective will assist the Court in addressing the role of federalism in this unique context where Congress has acted only as an arbiter of disputes among the States.

STATEMENT

Although this case presents a question of fundamental importance, it is not the one suggested by New York. Specifically, this case does not require a choice between *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), or any other federalism test. Rather, this case requires this Court for the first time to address the operation of the Constitution's structural federalism protections where Congress acts in the role of an *umpire* arbitrating interstate trade disputes, rather than as a lawmaker imposing uniform national policies on the States. As is demonstrated herein, when Congress acts in this umpire role, the concerns that led to our federalist

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[1] The Rocky Mountain compact includes Nevada, Wyoming, Colorado, and New Mexico. The Northwest compact includes Washington, Oregon, Idaho, Montana, Utah, Alaska, and Hawaii. The Southeast compact includes South Carolina, North Carolina, Virginia, Tennessee, Mississippi, Alabama, Georgia, and Florida.

system—principally, preventing one sovereign from aggrandizing its power at the expense of the other and preserving political accountability—are least implicated.

A. The Politics and Economics of LLRW Disposal Facility Siting.

"Waste has nothing to recommend it."[2] Its introduction into a community carries with it both aesthetic and economic problems for local residents. And, when waste bears the label "radioactive" those problems are greatly magnified: "[Radiation] is not only invisible, impalpable, and inaudible, like the miasmas against which our less sophisticated predecessors closed their shutters, but odorless as well. [I]t has come to symbolize all that is insidiously threatening."[3] Thus, while safe, long-term disposal technology does presently exist,[4] siting a LLRW disposal facility is inevitably a political bombshell.

Moreover, the operation of the "Dormant" Commerce Clause, which has been interpreted to restrict a State's ability to close its borders to waste originating in its sister States, see *e.g.*, *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), significantly affects the political and economic calculus by empowering a State to "export" its LLRW to other States. Thus, although

> [t]he costs of a new facility, including the financial and political costs of dealing with local opposition, fall primarily on the host state . . . the benefits of the facility accrue in part to the several surrounding states. Conversely, the costs of a state's failure to ensure that new facilities are built fall primarily on surrounding states whose facilities receive the excess

[2] Bord, *The Low-Level Radioactive Waste Crisis: Is More Citizen Participation the Answer?*, *in* Low-Level Radioactive Waste Regulation 193, 195 (Burns ed., 1988).

[3] Lutzger, *Making the World Safe for Chicken Little, or the Risks of Risk Aversion*, *in* Low-Level Radioactive Waste Regulation 175, 179 (Burns ed., 1988).

[4] National Governors' Ass'n, *Low-Level Waste: A Program For Action* 1 (Oct. 1980) ("NGA 1980 Report").

> waste, whereas the benefits of such a decision accrue to the state which, in effect, decides to export its hazardous wastes. Thus, states that have too few hazardous waste facilities lack incentives to participate in the siting process and thereby to ensure that new facilities are built within their borders.

Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 Harv. Envtl. L. Rev. 307, 327 (1982).[5] Together this "reverse commons" problem and exaggerated perceptions of risk create the familiar "not-in-my-backyard" syndrome: "each community [or State] refuses to take action in the hope that if it delays long enough, facilities will be sited in other communities [or States]." *Id.* at 325; see also 131 Cong. Rec. H11,416 (daily ed. Dec. 9, 1985) (statement of Rep. Nielson) ("We have often said in this Congress that a radioactive waste site is a great thing for your neighbor's State to have").

These same political and economic considerations pose a significant barrier to a market solution. Private site developers must locate persons in each community who are willing to negotiate—a difficult task given the politics of LLRW; they must also shop around for a community willing to accept "reasonable" compensation. Moreover, since many people view LLRW disposal sites as inherently unsafe, it may be that no amount of money is sufficient to win local support. Finally, even if local support can be garnered, activists may be able to orchestrate a state veto. See McCaughey, *South Dakota Town Dreams of its Own Nuclear Waste Dump*, The Energy Daily 13 (17):1, 4 (1985).

[5] *See also* McConnell, *Federalism: Evaluating the Founders' Designs*, 54 U. Chi. L. Rev. 1484, 1495 (1987) ("if the costs of government action are borne by the citizens of State C, but the benefits are shared by the citizens of States D, E, and F, State C will be unwilling to expend the level of resources commensurate with the full social benefit of the action"); Posner, *Economic Analysis of Law* 600 (3d ed. 1986) ("If either the benefits or costs of an activity within a state accrue to nonresidents . . . the incentives of the state government will be distorted").

Even if risk perceptions and the reverse commons problem can be resolved with a potential host community, the economics of operating a LLRW disposal facility complicate the siting equation. With the exception of a few of the biggest waste-generating states—such as New York—the volume of waste generated in a single state is too small to make a single-state disposal site economical. NGA 1980 Report at 6. Instead there is a need for a limited number of well-regulated and economically viable regional sites.[6]

B. The Events Leading to the Low-Level Radioactive Waste Policy Act of 1980.

By the mid 1970's an interstate LLRW disposal crisis started to brew. Between 1975 and 1979, the nation saw its inventory of LLRW disposal sites fall by half when New York and Illinois—two of the largest generating states—and Kentucky closed their facilities. Officials in the three remaining States with disposal facilities—South Carolina, Nevada, and Washington—along with the Southern and Western regions of the nation generally, became understandably concerned that they were becoming the nation's nuclear dumping grounds. Moreover, there was no movement in any other States to develop alternative disposal sites to relieve this interstate tension. In 1979, the States with disposal facilities took action. The governors of Nevada and Washington temporarily closed their States' LLRW disposal facilities,[7] and the governor of South Carolina indicated that State's intent to reduce dramatically the amount of low-level waste it would accept.[8] And, in 1980, the voters of Washington overwhelmingly approved Initiative 383 prohibiting importation of non-medical radioactive waste after July 1, 1981.[9]

[6] "Regionalization" is also mandated by safety concerns connected with long distance transportation of LLRW. See section 4(a)(1)(B) of the Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980) ("low-level radioactive waste can be most safely and efficiently managed on a regional basis").

[7] The Nevada and South Carolina sites are scheduled to close permanently by the end of 1992. Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 50, 52 (1991).

These developments sharply focused congressional attention on LLRW disposal, and a number of proposals—including federal preemption of State siting decisions—were considered. Congressional action was deferred, however, at the request of the States, who urged Congress to allow them to develop a cooperative State and regional LLRW policy. The National Governors' Association ("NGA"), the National Conference of State Legislatures, and the State Planning Council on Radioactive Waste Management all examined the LLRW disposal problem, and by the summer of 1980 a State solution—supported by New York and every other state—was crafted. The States proposed solving the LLRW disposal problem on a regional basis, whereby groups of States would enter interstate compacts, to be approved by Congress, to provide a single disposal facility for all waste generated within the region.

Congress enacted the State compromise in the Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980). States were invited to enter compacts "to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." § 4(a)(2)(A). Beginning January 2, 1986, each congressionally-ratified compact was authorized to "restrict the use of the regional disposal facilities under the compact to the dis-

[8] *See* Peckinpaugh, *The Politics of Low-Level Radioactive Waste Disposal, in* Low-Level Radioactive Waste Regulation 45, 46 (Burns ed., 1988).

[9] *See id.* Initiative 383 was subsequently declared unconstitutional. *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

posal of low-level radioactive waste generated within the region." *Id.* at § 4(a)(2)(B). The logic of the proposal was that this authority to exclude out-of-region waste would spur nonsited States either voluntarily to negotiate a disposal contract with a neighboring sited State or compact or to develop a new disposal site, either alone or with other States through a regional compact.

The 1980 Act had an immediate and positive effect on the LLRW disposal problem. By 1982, 13 states had siting programs in effect, see National Governors' Ass'n, *State Siting Programs in Effect as of January 1, 1982* (Jan. 25, 1982), and 37 states had entered into compacts by the summer of 1985, see Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1952?*, 11 Harv. Envtl. L. Rev. 437, 447 (1987). However, while many States and regions made significant progress toward LLRW disposal self-sufficiency, both the States and Congress had seriously underestimated the force of local siting opposition.

C. The Low-Level Radioactive Waste Policy Amendments Act of 1985.

By 1983 it became clear that the States and regions would require more time to work out their siting arrangements, see Berkovitz, *Waste Wars*, 11 Harv. Envtl. L. Rev. at 445, and interstate tension reached a new high as the 1986 target date approached.[10] Again, congressional action appeared imminent, and again the States, expressing their continuing view that LLRW disposal was best addressed at the State and regional level, *not* the national level, requested the opportunity to craft a State and regional solution. Congress assented, and the States reconvened, once more under the auspices of the NGA. They emerged with a hard-fought compromise pursuant to which sited States and regions would open their facilities to out-of-state waste for an additional seven years in return for a commitment by the other States—backed by strong incentives—to attain self-sufficiency, either individually or by contract or compact by 1993.[11] With the unanimous passage of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021i (the "1985 Amendments"), which was "primarily a resolution of the conflicts between the States that do not have disposal capacity, and the three other States that have capacity," 131 Cong. Rec. H11,410 (daily ed. Dec. 9, 1985) (statement of Rep. Udall), Congress adopted the States' compromise.

In accordance with this compromise, the 1985 Amendments contained a series of milestones or interim goals for States without existing disposal facilities. First, each State was expected by July 1, 1986, to join a compact or indicate an intent to "go-it-alone." See 42 U.S.C. § 2021e(e)(1)(A).[12] Next, by January 1, 1988, each compact or go-it-alone state was encouraged to identify a facility location and develop a facility siting plan, or contract with a sited compact for access to that region's

[10] *See Ratification of Interstate Compacts for Low-Level Radioactive Waste: Hearings before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs on H.R. 1012, H.R. 3092, H.R. 3777*, 98th Cong., 1st Sess. 64 (1983) (statement of Holmes Brown, National Governor's Association) ("The States . . . are concerned that regions are going to play chicken in Congress with the regions without disposal capacity threatening to block ratification of compacts [with disposal capacity]. On the other hand, those regions [with capacity] may say if we don't get satisfaction—in other words, if our compacts are not ratified—we are under no requirement to keep our sites open").

[11] *See* Peckinpaugh at 55 ("The sited states were not about to be burned again by other nonsited states that failed, for whatever reason, to develop new disposal sites").

[12] Even States which made an initial decision to "go-it-alone" remain free to join an existing compact or form a new compact with other unaffiliated States. Indeed, at least four unaffiliated States are actively seeking to enter contracts or compacts with States or compacts that will have disposal facilities by January 1, 1993. Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 40 (1991).

facility. *Id. at* § 2021e(e)(1)(B). The January 1, 1990 milestone called for an application for a disposal license, or the filing of a contract with a sited region for access to that region's facility or the filing of a certification expressing an ability to attain LLRW disposal self-sufficiency by December 31, 1992. *Id.* at § 2021e(e)(1)(C). January 1, 1992 was the milestone date for final license applications or intercompact disposal agreements. *Id.* at § 2021e(e)(1)(D).

The 1985 Amendments provided three basic incentives to State attainment of the milestone goals and the States' promises to resolve their LLRW disposal problems:

> (1) *The Access Provisions*: Beginning July 1, 1986, sited regions and States may charge noncomplying States' generators surcharges two to four times higher than surcharges paid by complying States' generators, and beginning January 1, 1987, sited regions and States may deny all access to the waste of noncomplying States' generators, 42 U.S.C. § 2021e(e)(2);
>
> (2) *The Expenditures Provisions*: Beginning July 1, 1986 complying States are eligible for payments—funded by the disposal surcharges—to defray costs of the siting process, *id* at § 2021e(d)(2)(B);
>
> (3) *The Take Title Provision*: Beginning January 1, 1996, noncomplying States at "the request of [a] generator or owner of . . . waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred . . . as a consequence of the failure of the State to take possession of the waste." *Id.* at § 2021e(d)(2)(C).[13]

[13] The so-called "Take Title" provision does *not*, in fact, require New York or any other State to take title to LLRW. New York can either solve its LLRW disposal problem alone or collectively with another State or group of States *or* take title *or*, if it chooses to abdicate all responsibility for LLRW disposal, risk liability to New York generators injured by its failure to address New York LLRW disposal issues.

The 1985 Amendments have been extremely successful at solving the seemingly intractable hurdles to LLRW disposal facility siting. There are now a total of nine interstate compacts, representing 43 states. See Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 3 (1991). Each of the compacts has designated a State to host a disposal facility. *Id.* Three of the host states—California, Nebraska, and Illinois—have submitted license applications, and the California facility is nearly operational. *Id.* at 7, 12, 26. In addition, the Northwest Compact and the Rocky Mountain Compact have negotiated a proposed agreement whereby generators in the Rocky Mountain Compact's member states will have long-term access to the LLRW disposal site in Washington. *Id.* at 47. Finally, the few states—including New York—that have elected to go-it-alone have also made significant progress.[14] While hurdles remain to complete State self-sufficiency, the cooperative *State* compromise represented by the 1985 Amendments continues to provide an adequate framework to bring the LLRW disposal crisis to ultimate resolution.

SUMMARY OF ARGUMENT

This case requires the Court to address for the first time the nature of judicial review under fundamental principles of federalism when Congress assumes the role of arbiter of disputes among the several States. Neither of the principal purposes of federalism—preventing one sovereign from aggrandizing its power at the expense of the other and preserving political accountability—is implicated by the 1985 Amendments. At bottom, the 1985 Amendments embody a *State* agreement to resolve interstate and interregional disputes. Congress neither usurped

[14] Through 1990, New York, for example, met each of the milestone goals and was judged in full compliance with the 1985 Amendments by the Department of Energy and the sited States. Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 65 (1991).

State decisionmaking authority nor co-opted the States as enforcers of national policy when it granted its constitutionally required approval to that agreement. Rather, Congress merely enacted incentives—most of which were themselves suggested by the States—to encourage the States to stick to their own bargain.

It is these incentives, *not*, as New York argues, the phraseology Congress employed in setting forth the terms and conditions of the State bargain, that are subject to the review of this Court. These incentives pass constitutional muster under any federalism test urged upon this Court. Indeed, the first two incentives—the Access and Expenditure Provisions—are so plainly constitutional that New York's only attempt to invalidate them is its misguided assertion that they are not severable from the more controversial Take Title Provision.

The Take Title Provision is itself constitutional. The federal government has broad constitutional authority to resolve interstate disputes—including the authority, in this context, to issue commands to the States. Stripped of rhetoric, the only potential burden imposed upon New York by the Take Title Provision is a financial one permissible even under *National League of Cities*, because States retain control over the basic policy choices. In any event, there is a compelling federal interest in enforcing the regional solution agreed upon by the States.

Finally, the Take Title Provision plainly *is* severable. Congress would have elected to retain the Access and Expenditure incentives for State compliance with the State bargain even if the further incentive provided by the Take Title Provision was unavailable.

ARGUMENT

I. The 1985 Amendments Promote And Do Not Impede Fundamental Principles Of Federalism.

The Compacts, whose members are States, wholeheartedly agree with New York that federalism is a "fundamental principle." *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2399 (1991). But New York's distaste for the 1985 Amendments does not rest on federalism concerns. Rather, New York turns federalism on its head when it raises that doctrine as a *barrier* to State resolution of the State and regional problem of LLRW disposal facility siting.

At bottom, this is simply an interstate and interregional dispute. New York would like to foist its LLRW disposal problems on its more responsible neighbors. Its neighbors insist that it abide by the basic agreement embodied in the 1985 Amendments, which, like the 1980 Act, were fundamentally a *State* resolution of the dispute. New York was an active and vocal participant in the negotiation process, and for seven years after enactment, New York played along, doing just enough to retain access to the LLRW disposal facilities of the sited States and compacts. Having fully availed itself of all of the benefits of the 1985 Amendments' state-negotiated seven-year extension in access, New York petitions this Court for relief from the performance of its end of the bargain—namely, LLRW disposal self-sufficiency, which it is free to accomplish either by allowing construction of a LLRW disposal facility in New York or by entering a compact or a voluntary disposal contract with a sister State or States.

It is not surprising, then, that New York has failed to demonstrate that the 1985 Amendments in any way threaten state sovereignty or violate established principles of federalism. Under any rational analysis of the values inherent in our Federalism, the 1985 Amendments are not only unobjectionable, they are a laudable example of congressional respect for the position of the States in our federal system.

New York simply puts the constitutional cart before the horse: in its single-minded bid to construe individual decisions of this Court against the 1985 Amendments, it loses sight of the driving force of federalism that animates those decisions. Thus, while it repeatedly refers to the Tenth Amendment and the Guarantee Clause, it offers little insight into the fundamental values that lay behind the doctrine of federalism embodied in those provisions. Most specifically, New York fails to identify how the extraordinary step of judicial invalidation of the State-sponsored 1985 Amendments by the federal courts would promote *any* federalism values.

As this Court has recently reaffirmed, the triumvirate of federalism—Article IV, the Tenth, and the Eleventh Amendments—articulates a *structural* protection of sepation of governmental powers, see, *e.g.*, *Ashcroft*, 111 S. Ct. at 2399-2401, just as the structure of Articles I, II and III of the Constitution informs the doctrine of separation of powers between the departments of the national government, see, *e.g.*, *Immigration & Naturalization Serv.* v. *Chadha*, 462 U.S. 919, 946 (1983). Thus, any principled application of federalism to a challenged federal statute must begin by indentifying what fundamental values the doctrine is designed to promote. Constitutional history and this Court's decisions make clear that the principal goal of the doctrine of federalism is the same as the principal goal of the doctrine of separation of powers: protection of individual liberty through the preservation of multiple, robust, politically accountable competitors for government power. See, *e.g.*, The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people"); *Ashcroft*, 111 S. Ct. at 2400 ("In the tension between federal and state power lies the promise of liberty").

Properly viewed, this Court's federalism cases convey the consistent message that adherence to constitutional principles of federalism is determined through a twofold inquiry. First, the *aggrandizement* test asks whether the challenged provision is within the scope of Congress' enumerated powers or constitutes usurpation of State decisionmaking authority. See, *e.g.*, *Ashcroft*, 111 S. Ct. at 2400 ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front"); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("it was a favorite object in the Convention to provide for the security of the States against federal encroachment. . ."') (internal quotations omitted). Second, the *political accountability* test asks whether Congress in an attempt to avoid political and economic costs of federal legislation has impermissibly imposed a duty on the States to enforce *national* policies. See, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 777 (1982) (O'Connor, J., dissenting in part) ("State legislative and administrative bodies are not field offices of the national bureaucracy").

The 1985 Amendments infringe neither of these "affirmative limits the constitutional structure . . . impose[s] on federal action affecting the States under the Commerce Clause." *Garcia*, 469 U.S. at 556. First, there is *no* aggrandizement of federal power. On the contrary, the 1985 Amendments "unquestionably manifest[] an intention to leave this subject entirely to the States." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 207 (1824). Indeed, both the 1980 Act and the 1985 Amendments *increased* the authority of those states willing to join a compact and take responsibility for LLRW disposal problems on a regional basis by allowing them to limit access to the waste of their neighbors who refuse to accept that responsibility. There simply can be no doubt that through the 1985 Amendments Congress—at the States' request—has properly respected the States' authority to deal with their local and regional problems.

Nor is there any political accountability problem. The federal government has imposed *no* federal LLRW disposal policies on the States. Rather, the 1985 Amendments affirmatively express Congress' view that the LLRW problem should be worked out *entirely* by the States, individually and as members of interstate compacts. Congress neither set minimum federal standards, see, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), nor required consideration of federal proposals, see, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742 (1982).

Under the 1985 Amendments the States retain both authority over and political accountability for their LLRW disposal policies. *States* choose whether to handle LLRW disposal internally or to contract with other States or compacts in a joint disposal effort. 42 U.S.C. 2021c(a)(1). *States* choose whether to make LLRW disposal a government function or to leave siting, construction and management of disposal facilities to private firms (at private expense). *States* choose whether licensing and regulation of whatever disposal facilities they allow to be built will be handled by the federal government or by the States themselves, pursuant to authority conferred by the "agreement states" program under the Atomic Energy Act. *See* 42 U.S.C. § 2021. Finally, *States* choose how disposal efforts will be funded—they retain complete freedom to place the entire burden on waste generators by charging disposal fees or taxes directly or by allowing sister state facility operators with whom they have contracted to collect such fees. Indeed, pursuant to the 1985 Amendments, *States* can even abdicate *all* responsibility for LLRW disposal—fiscal and administrative—simply by allowing private firms to place their own capital at risk in privately owned and operated disposal facilities, regulated by the federal government.

The 1985 Amendments also further the secondary goals of federalism. Local, decentralized control of LLRW disposal facilitates government decisions sensitive to the diverse interests affected, increases the opportunity for citizen involvement in the democratic process, and promotes innovation and experimentation. See *Ashcroft*, 111 S. Ct. at 2399. New York's federalist call to arms simply rings hollow; true federalists should welcome Congress' decision not to follow its modern tradition of pushing the States aside and imposing uniform national solutions to State and regional problems.

Examination of the impact on federalism values that would accompany judicial invalidation of the 1985 Amendments is also informative. Such action would almost surely *increase* federal intrusion on state sovereignty. Initially, sited states, rightly frustrated by the inequity of bearing involuntarily other states' burdens and angered by New York's eleventh-hour breach of the 1985 bargain, would likely renew their efforts unilaterally to close their borders to out-of-state waste. New York and other generating states would undoubtedly respond with suits in *federal* court. But, experience has demonstrated that the exercise of judicial power pursuant to authority found under the "Dormant" Commerce Clause, is ill-equipped to reconcile the conflicting and shifting regional equities, science, and politics of waste disposal.[15] Disjointed and pervasive judicial intrusion into state legislative processes—including judicial review of legislative motivations, see *City of Philadelphia* v. *New Jersey*, 437

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[15] *See Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("[w]eighing the governmental interests of a State against the needs of interstate commerce is . . . a task squarely within the responsibility of Congress . . . and ill suited to the judicial function"). *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 631 (1978) (Rehnquist, J., joined by Burger, C.J., dissenting) (inflexible application of "Dormant" Commerce Clause jurisprudence to problem of hazardous waste presents sited states with a "Hobson's choice"); *cf. West Virginia ex. rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("[interstate disputes are] more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted") (quotation omitted).

U.S. 617, 629 (1978)—would replace the orderly *State* resolution of LLRW disputes facilitated by the 1985 Amendments.

The only other alternative is complete federal preemption, with siting decisions made by a federal bureaucracy inherently more removed from the legitimate concerns of local citizens than are the States. Congress took the preemption route with high level radioactive waste ("HLRW"), and the results have hardly promoted federalism. The Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, § 1, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10,101-10,226), authorized the federal government to select a single site for disposal of all of the nation's HLRW, thus rendering States and their citizens virtually powerless to determine whether or not there will be a HLRW facility located "in their backyard." What has followed is a perfect example of the mischief that results when decisionmaking authority is insulated from political accountability—politics replaced equities and economics, and initial siting decisions arguably were made "primarily on the basis of political affiliation of congressional candidates from the affected states." Berkovitz, *Waste Wars*, 11 Harv. Envtl. L. Rev. at 486 n.197; see also *Politics Affected Nuclear Dump Choice*, Washington Post, Aug. 1, 1986, at A1, col. 6. Neither of these alternate approaches—federal judicial supervision or congressional preemption—serves the values of State sovereignty, political accountability, or individual liberty nearly as well as the approach crafted by the States and approved by Congress in the 1985 Amendments.

Here, Congress' *sole* role in these interstate disputes has been that of *umpire* or *referee*; Congress is not imposing *any* federal policies on the States. The States made a relatively simple bargain to resolve their interstate LLRW disputes: sited States agreed to open their borders to nonsited States' waste for another seven years, and in return the nonsited States agreed to attain self-sufficiency —individually or by compact. The States then asked Congress for its constitutionally-required approval of

their bargain. Congress assented, and it approved incentives to promote one simple and uncontroversial ground rule: *stick to your bargain*. The 1985 Amendments establish an orderly process for a collaborative resolution *by the States* of their State and regional problems. *Cf. West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a Sister State").

The role of umpire between disputing States and regions played by Congress in the 1985 Amendments is one central to the plan and structure of our Constitution. Perhaps the single most important reason for the historic change from Confederacy to federal Union was to provide a mechanism for resolving trade disputes between the States. See, *e.g.*, The Federalist No. 80, at 477-78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Whatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and control"); *id.*, No. 7, at 62-63 (Hamilton); *id.*, No. 22, at 144 (Hamilton); *id.*, No. 42, at 267-68 (Madison). The Federalist papers and other writings contemporaneous with the framing of the Constitution clearly establish that Congress' "umpire" role was universally recognized as a legitimate function of the new national government and not an impermissible affront to state sovereignty.[16] Indeed, the Compact Clause

[16] The creation of "a superintending authority over the reciprocal trade of confederated States," was one of the driving forces behind the Constitution. The Federalist No. 42, at 268 (James Madison) Clinton Rossiter ed., 1961). *See also* Letter of James Madison to George Washington (April 16, 1787), *reprinted in* Ketchum, The Anti-Federalist Papers and the Constitutional Convention Debates 33 (1986) ("[t]he great desideratum which has not yet been found for Republican Governments seems to be some disinterested and dispassionate *umpire* in disputes between different passions and interests in the State") (emphasis added). Indeed, Madison later explained that the Commerce Power "was intended as a negative and preventive provision *against injustice among the States themselves*." Letter of James Madison to J.C. Cabell (Feb. 13, 1829), *reprinted in* 3 Farrand, The Records of the Federal Convention of 1787, 478 (1911) (emphasis added).

itself, U.S. Const. art. I, § 10, cl. 3, recognizes the fundamental role of Congress as arbiter of interstate disputes.

Unable to challenge the consistency of the general approach of the 1985 Amendments with fundamental federalism principles, New York has focused its attack on a single provision of the 1985 Amendments—the Take Title Provision—added by Congress to encourage nonsited states to hold to their bargain. While, as demonstrated, *infra*, that provision—and each of the other incentive provisions—is constitutionally permissible under any principled test of federalism, the nature of the federal role in the 1985 Amendments scheme is obviously the starting point in any federalism analysis. Where, as here, the underlying governmental dispute is State v. State or Region v. Region with the Congress acting only as a referee, rather than the Federal v. State struggles envisioned by the Framers when they crafted the structural protections of federalism, judicial review based on principles of federalism is properly at its lowest ebb. The 1985 Amendments are completely consistent with the Constitution's structural federalism protections, and New York's ostensibly federalist attack must therefore fail.

II. The 1985 Amendments Are Not Direct Federal Commands To The States.

New York erroneously characterizes the 1985 Amendments as federal commands to the states. First, as demonstrated, *infra* pp. 23-24, Congress *may* issue commands to the States when it is acting as an arbiter of interstate disputes. In any event, the 1985 Amendments are not commands, but merely set out State-created and congressionally-approved LLRW disposal "milestones" which the States are *encouraged* to attain through a series of incentive provisions. It is those incentive provisions that are subject to federalism scrutiny, *not* the milestone provisions, or, as New York would have it, the 1985 Amendments as a whole.

New York builds its entire "command" argument on the presence of the word "shall" in several provisions of

the 1985 Amendments. In so doing, New York ignores precedent, context, structure, legislative history, and the "plain statement" rule that applies to statutory interpretation of federal statutes challenged on federalism grounds. See *Ashcroft*, 111 S. Ct. at 2403-06.

This Court has never based its federalism decisions on the presence or absence of words like "shall" in a challenged federal statute. Had it done so, there would have been little need for the intense intellectual debate that characterized *FERC* v. *Mississippi*, which also involved a challenge to a federal statute in which "shall" provisions were directed at States as States. *FERC* v. *Mississippi*, 456 U.S. at 759, 761. No opinion in that case, however, turned on that fact: the majority opinion rested on the options left to States disinclined to follow the congressional scheme, and the dissenting opinion relied upon the *National League of Cities* balancing test.

In any event, it is clear that Congress intended the 1985 Amendments *not* as federal commands to the States, but principally as State-created incentives to meet the wholly State-created goals that formed the basis of the 1985 compromise among the States and regions. The first "shall" comes in the 1985 Amendments' statement of policy, which was borrowed from the original 1980 Act: "Each state shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of [LLRW] generated within the State." 42 U.S.C. § 2021c(a)(1). That statement is a mere truism that recognizes two key facts (1) the federal government's refusal to enter the field and "rescue" nonsited states from their own failure to act, and (2) the authority granted to the sited regions to prevent nonsited states from exporting their waste to unwilling neighbors. Moreover, it is simply absurd to cast Congress' expression of its decision to *grant the States' request* for continued State authority over LLRW disposal as a federal *command* to the States.

Nor are the milestone provisions federal commands. As demonstrated by their inclusion in the section titled

"Requirements For Access To Regional Disposal Facilities," the milestones are merely goals, the attainment of which allows a State to receive certain benefits, most importantly, access to neighboring states' disposal facilities. The milestones are thus the *price* for continued access—a price the nonsited States agreed to pay in the 1985 compromise. See, *e.g.*, 131 Cong. Rec. H11,417 (daily ed. Dec. 9, 1985) (statement of Rep. Campbell) ("The [1985 Amendments], in essence, embod[y] a carefully crafted agreement whereby the three existing site states allow the January 1, 1986 cut-off date to be extended 7 years to December 31, 1992. In return other states and waste generators agree to meet a series of milestones . . .").[17]

At most, New York might argue that the policy statement and milestone provisions *could* be interpreted as federal commands. But, as this Court made clear in *Ashcroft*, any ambiguity in a statute challenged on federalism grounds must be construed *against* a possibly constitutionally impermissible interpretation. *Ashcroft*, 111 S. Ct. at 2403-06. Thus, for New York's argument to prevail, "it must be plain to anyone reading the Act," *id.* at 2404, that Congress meant to compel State compliance with the milestone goals even with respect to States willing to forego the incentives and lose the benefits of compliance. That reading of the 1985 Amendments is not plausible, much less plain. The 1985 Amendments, in accordance with the State compromise upon which they are based, merely set State-created and congressionally-approved goals for the States, noncompliance with which invokes the various incentive provisions—namely, the Access, Expenditure, and Take Title Provisions. That *structure* is constitutionally unobjectionable. See *Massachusetts* v. *Mellon*, 262 U.S. 447, 482 (1923).

The constitutionality of the 1985 Amendments must be judged by what they do, not by what phraseology Con-

[17] Even if the milestones were interpreted as direct federal commands to the States, New York's challenge is moot, since New York has met each of the milestones and judicial invalidation would not enable it to "undo" its compliance.

gress chose to use. The proper inquiry is whether the particular *means* adopted by Congress to encourage States to comply with the States' own bargain are within Congress' enumerated powers and compatible with federalism values. Thus, in accordance with Justice Cardozo's cogent expression of the general rule in constitutional adjudication that the judicial "knife is laid to the branch instead of at the roots," *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 60 (N.Y. 1920), *cert. denied*, 256 U.S. 702 (1921), we address each of the incentive provisions in turn.

III. The Incentive Provisions Of The 1985 Amendments Designed To Hold States To Their LLRW Bargain Are Constitutionally Permissible.

At bottom, this case is primarily an attempt to bootstrap a challenge to the most controversial fragment of the 1985 Amendments—the Take Title Provision—into a vehicle for striking down the entire law, particularly the Access Provisions, which encourage New York to take responsibility for its LLRW disposal problems. Simply put, New York, having drained the 1985 Amendments of all benefits, asks this Court belatedly to declare unconstitutional what remains of the bargain, so that New York waste generators can continue to burden other States with the enormous quantities of waste generated in New York. Under no circumstances should New York's bootstrap approach prevail. First, the Access and Expenditure Provisions are plainly constitutional under settled law not challenged in this case. Second, the Take Title Provision is itself constitutional under any applicable federalism test. Finally, in any event, the Take Title Provision is plainly severable.

A. The Access and Expenditure Provisions are Constitutionally Permissible.

Not surprisingly, New York devotes scant attention to the primary incentive enacted by Congress to encourage States to attain the milestone goals for LLRW disposal self-sufficiency—the grant of authority to sited States and

compacts to deny access to waste generated in noncomplying States. This Court has long recognized that Congress may, in the exercise of its plenary commerce authority erect barriers to interstate commerce, and "Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980). When Congress does so, as it did in the 1985 Amendments, "any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 653 (1981).

Obviously, there is no basis for a federalism challenge to such a conditional grant of authority by Congress to the States. First, the regulation of interstate commerce is a power expressly granted to Congress and therefore clearly outside of the Tenth Amendment's reservation of rights to the States and the people. Second, as discussed, *supra*, offering the States this tool to solve their common problems results in neither aggrandizement of national power nor a loss of political accountability. On the contrary, the Access Provisions, which place the costs of a State's unwillingness to respond to its LLRW problems on its industry and ultimately its citizens, *ensure* that local and State officials are held politically accountable for local and State policies (or the lack thereof). Third, the Access Provision does not operate against the States as States. Rather, it *permits* a compact to exclude LLRW generated in a noncomplying State outside of its compact region, regardless of whether that waste was generated by the State itself or by a private generator.

The 1985 Amendments' provision for incentive payments to complying states is similarly unobjectionable. It is no more than a routine exercise of Congress' Spending Power. It is well settled that "[i]ncident to this power, Congress may attach conditions on the receipt of federal

funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the receipt with federal statutory and administrative directives.'" *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (citation omitted). Here Congress conditioned the receipt of surcharge rebates on attainment of the milestones. *States* choose whether or not to meet the conditions required to obtain such funds, and the Expenditures Provision is thus an archetype example of the "cooperative federalism" that this Court has consistently sanctioned.

B. The Take Title Provision is Constitutionally Permissible.

New York devotes the bulk of its attack to the Take Title Provision. That provision also withstands federalism scrutiny. The basic thrust of New York's argument is that the Take Title Provision is not an incentive or penalty, but an alternative means of performance that essentially leaves it with a Hobson's choice of compliance with one of two federal commands. Even if New York's characterization of the Take Title Provision as a "command" were true—and the Compacts maintain that it is not, see *supra* p. 8 n. 13, —the provision still would be constitutionally unobjectionable.

First, when the federal government acts as an umpire to help the States resolve a "commons" problem—*e.g.*, a dispute over water rights or pollution with respect to a river that flows through several States—or, as here, a "reverse commons" problem, see *supra* pp. 2-3, this Court has repeatedly recognized that the federal government is constitutionally empowered directly to *command* State performance where one State attempts unfairly to exploit the regional "commons." See, *e.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 185 (1982) (noting that the Court had in the past "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream"); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940); *New Jersey* v. *City of*

New York, 283 U.S. 473 (1931); *Wyoming* v. *Colorado*, 259 U.S. 419 (1922). As this Court only recently stated, these federal common law cases reflect the appropriate level of "respect for the sovereignty of the States" in the context of resolving interstate disputes. *Arkansas* v. *Oklahoma*, Nos. 90-1262, 90-1266, 1992 WL 32008, at *4 (U.S. Feb. 26, 1992). Nonetheless, New York seeks to distinguish the precedents as involving judicial rather than legislative powers. Plainly, however, the Tenth Amendment does not impose greater limits on congressional action than on federally-created common law. *Cf. Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938); *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) (recognizing that cooperative State and congressional resolution of interstate disputes through interstate compacting is preferable to federal common law resolution). In any event, this Court has expressly approved congressional commands to the States in the context of interstate "commons" problems. *See City of Milwaukee* v. *Illinois*, 451 U.S. 304, 325-26 (1981) (upholding Clean Water Act provisions which commanded States whose water licensing decisions could impact other States to give those other States reasonable notice and an opportunity to be heard and also to issue written explanations of the licensing decisions).

Second, New York does not allege any of the potential threats to State sovereignty this Court has found objectional outside the interstate dispute context. For example, New York does not allege that compliance with the 1985 Amendments' milestones "will entail basic structural changes . . . in any . . . traditional local service." See *Friends of the Earth* v. *Carey*, 552 F.2d 25, 38 (2d Cir. 1977) (cited with approval, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 n.30 (1981)). The LLRW disposal siting process is ordinary land use regulation routinely practiced by New York's state and local governmental authorities: "The state regulatory machinery is not diverted from its regular duties but continues to enforce the identical type of rule it has traditionally implemented." *Nevada* v. *Skinner*, 884 F.2d 445, 453 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070

(1990); *FERC* v. *Mississippi*, 456 U.S. 742, 752-53 (1982); *Testa* v. *Katt*, 330 U.S. 386 (1947).[18]

Third, stripped of New York's rhetoric concerning the phrase "take title," the only real intrusion that New York alleges is the financial burden of solving its LLRW disposal problems. But, the mere necessity of appropriating funds, standing alone, is not the kind of injury found impermissible by this Court in *National League of Cities* or any other case where, as here, the basic policy choices are left to the States. See *Friends of the Earth*, 552 F.2d at 38; see also *supra* p. 14. Congress often takes actions that directly or indirectly impair state finances. In any event, no matter how economically burdensome the siting process may be, New York need not incur such costs, since, as explained, *supra* p. 14, New York is free under the 1985 Amendments to contract for access by its LLRW generators to the facility of another State or compact, with the entire cost of this discretionary access borne by the waste generators themselves. And, given New York's authority to tax generators of waste, the existence of the Expenditure Provisions, and New York's ability to revoke its "agreement state" status and allow the federal government to bear regulatory burdens, additional resources may not be necessary even if New York does elect to allow a disposal facility in New York.[19]

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[18] While the fact that "radioactive" materials are involved certainly complicates the land use equation, "New York State has been active in the regulation of such materials within its borders for close to three decades as an agreement state in accordance with 42 U.S.C. § 2021(b)." 91-543 Petition at 12 n.5.

[19] "The New York State legislature appropriated $5.87 million to fund Siting Commission activities in fiscal years 1990-1991. As of the end of the calendar year 1990, the State collected approximately $40.8 million in low-level radioactive waste assessments from the electric utilities to reimburse expenditures by the Siting Commission, Department of Environmental Conservation, and Department of Health. The State earned $3.1 million in interest on those funds." Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 34 (1991); *Cf.* Wash. Rev. Code § 43.200.080 (1990).

Fourth, even under the *National League of Cities* test, this Court consistently recognized that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 n.29 (1981). This is such a case. Congress has a strong federal interest—well grounded in constitutional text and history—in enforcing the interstate and interregional agreements it allows to take place. The 1985 Act was front-end loaded in benefits to New York and other large LLRW generators. New York consumed its full share of those benefits without a hint of its view that the statutory scheme that allowed it to export its waste was unconstitutional. It does no offense to State sovereignty or to fundamental values of federalism for Congress to adopt a mechanism that now holds New York to its obligations under the State bargain. *Cf. FERC* v. *Mississippi*, 456 U.S. at 784 n.13 (O'Connor, J., dissenting in part) (Congress may place requirements on the States so that policies "which the States themselves had chosen [would] be maintained") (citation omitted).

Finally, and most clearly, New York's own conduct—exporting its waste for the full seven year extension period—constituted its acceptance of the Take Title Provision just as effectively as if that provision had been a part of the original State bargain.[20] Simply put, this Court has repeatedly held that under any federalism test, where a State accepts congressionally-created benefits (here seven additional years of access to cited state

[20] *Cf. West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 35 (1951) (Jackson, J., concurring) ("West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact. . . . Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act"); Restatement (Second) of Contracts §§ 19, 22 (1979).

LLRW disposal facilities and payments pursuant to the Expenditure Provisions), the State may not belatedly challenge the conditions Congress placed on those benefits. See *FERC* v. *Mississippi*, 456 U.S. at 764-65 (Congress may place conditions on continued state regulation); *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947). Here that rationale is particularly applicable because the sited States and the State members of ratified compacts have a reliance interest in enforcing the 1985 compromise, including the Take Title Provision which New York tacitly accepted by its conduct and receipt of benefits. New York hungrily devoured its salad, appetizer, entree, and dessert, and it may not now avoid the check by complaining that the entire meal was unconstitutional.

IV. The Take Title Provision Is Severable From The Remainder Of The Act.

Even if the Take Title Provision was constitutionally flawed, it is severable from the remainder of the 1985 Amendments. "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & N.E. Ry.* v. *Gutierrez*, 215 U.S. 87, 96 (1909). As Justice Cardozo explained: "Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 62-63 (N.Y. 1920), *cert. denied*, 256 U.S. 702 (1921). Thus, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (quotations omitted). The 1985 Amendments clearly retain their vitality and are "fully operative as a law" even without the Take Title Provision.

The circumstances surrounding the passage of the 1985 Amendments make clear that Congress would have enacted the statute even without the Take Title Provision. First,

an expeditious solution to interstate LLRW disputes was imperative—the three sited States were seriously threatening to close their sites, an event that would have triggered a nationwide crisis in energy and health care. Congress recognized the urgency of memorializing the hard-fought compromise among the States before any new disputes erupted. See, *e.g.*, 131 Cong. Rec. S18,121 (daily ed. Dec. 19, 1985) (statement of Sen. Moynihan) Second, the Take Title Provision received scant attention in the congressional debate; indeed, the House passed the bill *without* the Take Title Provision. Third, and most important, the Take Title Provision was a last minute addition to the 1985 Amendments, which did not in any way change the structure or purpose of the legislation, but merely constituted an *addition* to the existing battery of State-proposed incentives to discourage States from breaching their promises to solve their LLRW disposal problems either individually or by compact. Indeed, the 1980 Act *already* allowed compacts to deny access. It is unthinkable that Congress would have wanted the nonsited States to have *no* incentives to keep their bargain—including those incentives already in existence—if the new incentive provided by the Take Title Provision was later found to be constitutionally flawed. See 131 Cong. Rec. H13,077 (daily ed. Dec. 19, 1985) (statement of Rep. Mackey) ("Because the provision comes in only in 1996 or 1993, it is intended that the provision be severable from the rest of the act, should it be found unconstitutional").

The 1985 Amendments without the Take Title Provision would still "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). The basic goal of both Congress and the States was an expeditious resolution of interstate LLRW disposal disputes in accordance with the 1985 compromise between sited and nonsited States. As the means for achieving that end, Congress enacted a whole series of incentive provisions—most of them proposed by the States themselves. Should the Take Title Provision fall, the remaining incentive provisions would

clearly still usefully serve their purpose. Indeed, as New York's bootstrap attempt to strike down the Access Provision demonstrates, the threat of non-access alone should be sufficient to encourage responsible nonsited States to comply with the 1985 compromise.[21]

This Court's decision in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894) is directly on point. In that case, the challenged act vested a state railroad commission with the power of prescribing fares, freight rates and other regulations. The petitioner challenged a provision that established penalties for overcharges and argued that this defect rendered the entire statute unconstitutional. This Court found the penalty provision severable, reasoning:

> "[I]t is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties . . . were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment."

Id. at 396; see also *United States* v. *Jackson*, 390 U.S. 570, 586 (1968) (quoting *Reagan*).[22]

Not only would felling the 1985 Amendments tree because of a defect in the Take Title branch run counter to congressional intent, it would be wholly inequitable

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[21] Even if concern for its own economy and citizens affected by denial of access would not spur New York, "the New York State Power Authority currently operates two nuclear power plants within the State, and waste materials are produced at various state hospitals and research facilities." 91-543 Petition at 12 n.5, so New York will have no choice but to confront its LLRW disposal problems.

[22] While New York attempts to make much of the fact that there is no severability clause in the 1985 Amendments, this Court has long recognized that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968); "Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

to the sited States who relied to their detriment on the validity of the 1985 compromise as well as to the States that have entered compacts and operated through those bodies—at substantial expense—during the past seven years. In return for the benefit of seven years additional access for its LLRW to the sited States' facilities, New York and other nonsited States promised to attain LLRW disposal self-sufficiency by 1993. Even if New York could complain that somehow its consent was not informed by the possibility that its breach would invoke the Take Title Provision—and it cannot—removing that provision would be a full remedy, and any further invalidation of the 1985 Amendments would be an entirely unmerited windfall.[23]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[23] For similar reasons, the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Title II of Pub. L. No. 99-240, 99 Stat. 1859, in which Congress consented to seven of the nine existing interstate LLRW compacts, is constitutional and, in any event, severable from Title I, the 1985 Amendments. More fundamentally, the plaintiffs below challenged *only* the 1985 Amendments; neither in the courts below nor in the petitions for certiorari did any party raise any issue dealing with compact authorization under Title II. Thus, there is no basis for this Court to address any such issue at this time. *See, e.g., Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983); Sup. Ct. R. 14.1(a) ("[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court").

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NOS. 91-543; 91-558; 91-563
Consolidated

IN THE
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OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, and THE COUNTY OF CORTLAND, NEW YORK

Petitioners,

V.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS, STATES OF WASHINGTON, NEVADA AND SOUTH CAROLINA, IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* BY THE COUNCIL OF STATE GOVERNMENTS

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Pursuant to Rule 37.4 of the rules of this Court, Respondents, the states of Washington, Nevada, and South Carolina, object to the motion of the Council of State Governments (CSG) for leave to file an *amicus curiae* brief in support of Petitioners in this matter.

Contrary to the implication underlying the statement of counsel for the CSG, the *amicus curiae* brief submitted does not have the support of "all 50 state governments and numerous elected and appointed officials throughout the United States." *Motion for Leave to File Brief*, pp. 1-2.

The action to file this *amicus* brief was generated by the Council of State Government's legal committee, which is made up of only eight members. The current Chair of the Council of State Governments, Governor Zell Miller of Georgia, and the current Chair-Elect, Governor Edgar of Illinois, abstained from voting for the submission of this *amicus* brief.

The Low-Level Radioactive Waste Policy Act of 1980 and its 1985 Amendments were a product of the unanimity of all 50 states. The National Governors Association, the National Council of State Legislatures, and the State Planning Council on Radioactive Waste Management all played a critical role in forging agreement among all the states and persuading Congress to adopt the 1980 Act and its 1985 Amendments at the behest of the states.

The states of Washington, South Carolina, and Nevada were not provided any opportunity to discuss and debate the CSG's action to submit this *amicus* brief. It is not appropriate for the CSG to submit an *amicus* brief on the basis of a recommendation of a committee of eight members. The *amicus curiae* brief does not represent the views of the National Governors Association, the National Conference of State Legislatures, the State Planning Council on Radioactive Waste Management, the Legal Center for State and Local Governments, or the 50 sovereign state governments. The

amicus curiae brief only represents the views of an eight-member committee of the CSG.

Accordingly, the Respondents, states of Washington, Nevada, and South Carolina, by and through its undersigned counsel, respectfully request that the motion of the Council of State Governments for leave to file an *amicus curiae* brief in support of Petitioners be denied.

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Intervenors-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-543; 91-558; 91-563

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,
Petitioners,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,
Respondents.

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,
Intervenors-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

The Low-Level Radioactive Waste Policy Amendments Act of 1985 is a statute designed to deal with a problem of national concern—adequate provision for the safe disposal of low-level radioactive waste. At the same time, the Act seeks to accommodate the desire of the States to solve the aspects of the problem that implicate concerns that are peculiarly local in nature—in particular the siting of low-level waste disposal facilities—and, as well, to achieve a fair resolution of the conflicting interests of states that already had such facilities and states that did not.

As we show in considerable detail, the Act was crafted through a cooperative interchange between the States and the Congress. The method of the Act is to grant the States, as the States had requested, the primary regulatory authority for establishing and siting low-level radioactive waste disposal facilities, while placing enforceable obligations on the States to carry out that responsibility in a manner that protects the national interests that are involved.

The issue thus posed is whether the Constitution permits federal law to place affirmative regulatory responsibilities on the States in order to achieve national objectives. This Court has not yet elaborated the standards that govern determination of this issue. The Court has only gone so far as to indicate that there is no absolute constitutional bar to such a scheme. A contrary rule would be destructive of the very values that the bar would be meant to protect: strong state government and a dynamic federal system.

Accordingly, we proceed on the understanding that the general guide for judging the constitutionality of a scheme such as that here is whether the scheme in fact undermines the relationship between the States and the United States that is established by the Constitution—specifically, whether the scheme "impairs the ability of the States to function effectively in a federal system." *FERC v. Mississippi*, 456 U.S. 742, 765-766 (1982) (internal quotation marks omitted). The Act here causes no such impairment.

Viewed in practical, as opposed to theoretical, terms, it is implausible to characterize the Act as a mechanism for depriving the States of aspects of their sovereignty. The means employed by the Act cannot sensibly be divorced from its overall purpose: to permit the States to exercise the primary regulatory authority in an area where a scheme of direct federal regulation would have been warranted—and was indeed proposed—in view of the important national concerns involved.

The States sought this regulatory authority in order to preserve their ability to make determinations of great local sensitivity. And the Act is structured so that the States have control over that for which the States will be held accountable. Moreover, in resolving the conflicting interests between sited and non-sited states, the Act restores to the sited states an attribute of sovereignty that the Commerce Clause by itself takes away: the ability to deny to out-of-region generators of low-level waste access to in-state waste facilities.

In these circumstances, the Act must be seen as wholly consistent with the concepts of federalism embodied in the Constitution.

ARGUMENT

1. The federal statute under challenge here—the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et seq. (hereinafter "LLRWPAA" or "the Act")—addresses a problem of *national* concern: adequate provision for the safe disposal of low-level radioactive waste.

Activities that produce vital goods that are part of our national commerce—including devices used in medical treatment, diagnosis and research, as well as the research, development and production of myriad commercial products—also produce the "bad" of low-level radioactive waste.[1] The producers of these goods have no economic or market incentive to take special care in the disposal of this waste any more than any rational economic actor has an incentive to deal with any other externality. And depending on fortuity, the unsafe storage or disposal of such waste may create environmental and public health risks that affect individuals in political entities beyond the borders of the political entity in which the goods were produced.

At the same time, any system for the disposal of low-level radioactive waste necessarily implicates matters of peculiar concern to the States.

First, the siting of waste disposal facilities requires a sensitivity to state and local concerns that is more likely to be manifested by state-level determination than by the fiat of a more distant federal authority.

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[1] *See* National Governors' Association Task Force on Low-Level Radioactive Waste Disposal, *Low-Level Waste: A Program for Action* 3 (Nov. 1980) (hereinafter, "*A Program for Action*"); U.S. Department of Energy, *Spent Fuel and Radioactive Waste Inventories, Projections, and Characteristics* (1984) (cited in Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985*, 11 Harv. Env. L. Rev. 437 (1987) [hereinafter, "*Waste Wars*"]).

Second, in the absence of an applicable federal statute, limitations directly imposed on the States by the Commerce Clause of the federal Constitution serve to frustrate rather than advance responsible state regulation. The states that first provide sites for disposing of low-level waste cannot, consistent with the Commerce Clause, deny out-of-state waste generators access to those sites; that was settled by this Court's decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). *See* p. 7, *infra*. Thus, the states that are next in line have no incentive to undertake the expensive and unpopular task of developing such sites within their borders. As a result, in the absence of federal regulation, states that have waste disposal sites would be faced—and, in fact, were faced prior to adoption of the Act, *see* pp. 6-7, *infra*—with the choice of bearing an unfair share of a particularly undesirable national burden or of shutting down these faciilties.

The LLRWPAA is the product of an effort to develop a scheme that would accord proper weight to both the federal and the state interests involved in regulating the disposal of low-level radioactive waste. Indeed, as we discuss in some detail, pp. 5-18, *infra*, the Act was crafted through a cooperative interchange between the States and Congress. The result is an enactment that advances national objectives while maintaining the States' primary regulatory authority, and that, in addition, resolves the conflicting interests of differently situated states.

Because a detailed discussion of the history and substance of the Act is necessary to frame properly the issue for decision here, we turn next to that task.

2. With the advent of the nuclear power industry in the 1960's, this nation began generating significant quantities of both low-level and high-level radioactive waste.[2] For a period of time, the Atomic Energy Commission permitted the disposal of low-level waste at sea, but

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[2] H.R. Rep. No. 99-314, pt. II, 99th Cong., 1st Sess. 16 (1985).

safety concerns persuaded the AEC to stop issuing licenses for ocean disposal.[3] As a result, land burial became the exclusive method of disposing of low-level radioactive waste.

During the 1960's, six commercial low-level radioactive waste disposal sites were opened (along with thirteen federal disposal sites for low-level radioactive waste generated by Federal Government defense and research activities).[4] By 1978, however, three of those sites had been shut down as a result of a variety of serious environmental and public health problems.[5] That meant that all low-level nuclear waste was being transported to and dumped at just three sites, one in South Carolina, one in Washington, and one in Nevada (the "sited states").

In 1979, the problem of low-level radioactive waste disposal became even more serious. In July 1979, the Governor of Nevada temporarily closed the Nevada disposal site after a truck arrived leaking its cargo and another truck arrived with its shipment of waste on fire. In October 1979, the Governor of Washington found similar transportation and packaging problems at the Washington site and temporarily closed that site. The Governor of South Carolina—whose facility was receiving nearly 80 percent of the nation's low-level radioactive waste—ordered that facility to reduce the amount of waste it would receive by 50 percent.[6] And the Governor of Washington threatened to shut down the Washington facility entirely by 1982.[7]

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[3] Berkovitz, *Waste Wars, supra*, 11 Harv. Env. L. Rev. at 440.

[4] H.R. Rep. No. 99-314, *supra* note 2.

[5] *Id.* at 17.

[6] *Id.*

[7] *A Program for Action, supra* at 4 n.*. The threat of a closure of the Washington facility became even more imminent in November 1980, when the voters of that state approved an initiative which banned out-of-state wastes from disposal at the facility. That initiative was ultimately held to be violative of the Commerce Clause. *Washington State Bldg. and Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

Given the restirctions placed upon the States by the Commerce Clause, the sited states were left with two undesirable alternatives: either continue to accept the nation's low-level waste and bear the entire burden of the nation's beneficial use of low-level waste-generating technology, or eliminate or reduce in a non-discriminatory manner the amount of low-level waste accepted for disposal, threatening low-level waste generators of the sited states—and, indeed, of the entire nation—with loss of disposal facilities. The Governors of the sited states had made it clear that the first option was unacceptable, and thus a "national crisis . . . in availability of disposal capacity for low level nuclear wastes" was imminent.[8]

Facing such a crisis, the federal government became involved. Several congressional committees held hearings in 1979 with respect to nuclear waste management issues.[9] A number of bills were introduced which contained federal solutions to the low-level waste disposal issue.[10] In addition, the Department of Energy convened a Low-Level Waste Strategy Task Force which developed its own draft bill.[11] Finally, President Carter appointed a State Planning Council on Radioactive Waste Management. *See* 126 Cong. Rec. 20,135 (1980).

The States took steps to remain involved in the issue of low-level waste disposal. In December, 1979 the National Governors' Association created an eight-member Task

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[8] H.R. Rep. No. 96-1382, pt. II, 96th Cong., 2d Sess. 25 (1980).

[9] *See Nuclear Waste Managament: Hearings Before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology*, 96th Cong., 1st Sess. (1979); *Nuclear Waste Isolation Pilot Plant: Hearings Before the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. (1979).

[10] *E.g.*, H.R. 6390, 96th Cong., 2d Sess. (1980) (Rep. Udall); H.R. 6212, 96th Cong., 2d Sess. (1980) (Rep. Lujan).

[11] *See A Program for Action, supra* n.1, at 2, 33.

Force, chaired by Governor Bruce Babbitt of Arizona, to formulate state policy.[12]

In May, 1980, the State Planning Council, chaired by Governor Riley of South Carolina, submitted its recommendations to President Carter. That Council unanimously concluded that

> [t]he national policy of the United States on low-level radioactive waste shall be that every State is responsible for the disposal of the low-level radioactive waste generated by nondefense related activities within its boundaries and that States are authorized to enter into interstate compacts, as necessary, for the purpose of carrying out this responsibility. [126 Cong. Rec. 20,135 (1980)]

A few months later, the National Governors' Association Task Force issued a forty-one page report—which the Governors' Association unanimously endorsed [13]—reaching the same conclusion as the State Planning Council.[14] Recognizing that "the prospect of a federally-imposed solution is one option," the National Governors' Association concluded instead that "the disposition of low-level waste should be largely a state responsibility" for which a "solution developed by the states is preferable." *A Program for Action* at 5, 1. The Governors recognized, however, that because far fewer than fifty disposal sites were needed, a regional approach made best sense. The Governors thus recommended that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders" and that "the states should pursue a regional approach to the low-level waste disposal problem." *Id.* at 6.

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[12] *Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 8 (1983) (testimony of Gov. Evans of Idaho on behalf of the National Governors' Association).

[13] H.R. Rep. No. 99-314, *supra* n.2, at 18.

[14] *See A Program for Action, supra* n.1, at 2, 33.

To "facilitate the establishment of new disposal sites," the Governors further recommended that "Congress should authorize the states to enter into interstate compacts to establish regional disposal sites" and that "such authorization should include the power to exclude waste generated outside the region from the regional disposal site." *Id.* at 7. The Governors explained:

> Without the authority to ban out-of-region waste many states may find it politically difficult to join a new regional waste compact. Not only would this exclusivity power make it more attractive to form regional waste compacts in the first place, but as regions adopt such provisions the pressure will increase on those states which have not yet acted. [*Id.*]

Finally, the Governors' Association expressly addressed the federal solutions then under consideration by Congress. The Association concluded that "coercive measures are unnecessary at this time," and thus

> recommend[ed] that Congress defer consideration of sanctions to compel the establishment of new disposal sites until at least two years after the enactment of compact consent legislation. States are already confronting the diminishing capacity of present sites and an unequivocal political warning from those states' Governors. If at the end of the two-year period states have not responded effectively, or if problems still exist, stronger federal action may be necessary. But until that time, Congress should confine its role to removing obstacles and allow the states a reasonable chance to solve the problem themselves. [*Id.* at 8-9]

Congress moved quickly to act upon the recommendations of the State Planning Council and National Governors' Association. In July 1980, the Senate took up consideration of a bill which sought primarily to develop a federal solution to the problem of disposing of spent nuclear fuel.[15]

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[15] *See* S. 2189, 96th Cong., 2d Sess. (1980); S. Rep. 96-548, 96th Cong., 2d Sess. (1980).

As reported, the bill contained a provision which could have opened the door to a federal solution to the low-level nuclear waste problem by directing the President to submit a report to Congress on disposal of such waste.[16] But during the floor debate on the bill, Senator Thurmond introduced an amendment for the specific purpose of "implement[ing] recommendations made by The State Planning Council on Radioactive Waste Management to President Carter." 126 Cong. Rec. 20,136. That amendment recognized state responsibility for the disposal of low-level radioactive waste and invited the States to develop interstate compacts to manage the disposal of low-level radioactive waste on a regional basis, with the promise that such compacts could "restrict the use of regional facilities to the disposal of non-Federal low-level radioactive waste generated within the region." *Id.* Senator Thurmond explained:

> It is felt that the authority to exclude low-level waste generated in States outside the boundaries of a region is necessary to induce State participation in such compacts. Also, case law, including a decision by the U.S. Supreme Court in the case of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), indicates that an express congressional grant of exclusivity authority may be a necessary legal prerequisite to a host State's ability to exclude waste generated beyond the boundaries encompassed in a regional compact. [*Id.* at 20, 136]

Senator Thurmond's amendment was adopted by the Senate and the bill was passed by that body. *Id.*

In September 1980, the House Interstate and Foreign Commerce Committee and the House Interior and Insular Affairs Committee each reported out bills addressing the subject of nuclear waste and spent fuel disposal.[17] With

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[16] *Id.* at 16-17.

[17] *See* H.R. Rep. 96-1382, 96th Cong., 2d Sess., pts. I and II (1980).

respect to the subject of low-level radioactive waste, the Commerce Committee's bill closely tracked the Thurmond amendment implementing the recommendations of the State Planning Council and National Governors' Association;[18] the Interior Committee bill, in contrast, leaned towards a federal solution by prohibiting the Nuclear Regulatory Commission from granting exemptions from licensing requirements pertaining to shallow land burial methods unless states had entered into agreements or compacts.[19]

Before the Committee bills reached the floor of the House, a compromise was reached and a joint bill, H.R. 8378, was submitted. That bill, containing the Commerce Committee's provisions regarding low-level waste, *see* § 201 of H.R. 8378, was approved by the House on December 3, 1980. In the short time remaining before the expiration of the 96th Congress, the Senate and House were unable to reconcile their differences over how the federal government should resolve the matter of spent fuel and high-level nuclear waste, but an agreement was reached to strip out the provisions dealing with low-level waste and, on the last day of that Congress, those provisions were enacted into law as the Low-Level Radioactive Waste Policy Act of 1980, P.L. 96-573, 94 Stat. 3348.[20]

As recommended by the Governors, and as proposed by Senator Thurmond, the 1980 Act declared it to be:

> The policy of the Federal Government that—(A) *each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders* except for waste generated as a result of defense activities of the Secretary or Federal research and development activities; and (B) low-level radioactive waste can be most safely

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[18] *Id.*, pt. I, at 34-35.

[19] *Id.*, pt. II, at 25.

[20] In the next session of Congress, a law was enacted imposing a federal solution for high-level radioactive waste and spent fuel. *See* P.L. 97-425, 96 Stat. 2201.

and efficiently managed on a regional basis. [Pub. L. No. 96-573, § 4(a)(1), 94 Stat. 3348]. [Emphasis supplied]

In furtherance of this policy, the Act authorized the States to "enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste," which compacts would take effect only after Congress consented. *Id.*, § 4(a)(2)(B). Under the Act, an approved compact could limit access to its disposal facilities to compact states beginning on January 1, 1986. *Id.*, § 4(a)(2)(B).

Following passage of the Act, the States began negotiating the membership and content of regional compacts. By the end of 1983, seven proposed regional compacts had been formed, and four were submitted to the Ninety-Eighth Congress for approval.[21] Extensive hearings were held in that Congress with respect to those compacts and the low-level radioactive waste disposal issue.[22]

Those hearings ended in a "stalemate" [23] or "impasse" [24] that precluded congressional approval of the compacts

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[21] *See* H.R. 1012, 3002, 3777, 4388, 98th Cong., 1st and 2nd Sess. (1983 and 1984).

[22] *See Ratification of Interstate Compacts for Low-Level Radioactive Waste: Hearings Before the Subcomm. on Energy and Environment of the House Comm. on Interior and Insular Affairs*, 98th Cong., 1st Sess. (Oct. 25, 1983) and 98th Cong., 2d Sess. (February 23-24, 1984); *Low-Level Radioactive Waste Regional Compacts: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (Nov. 3, 1983); *Hearings on Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste, supra*, n.12. The Senate Committee on the Judiciary also held separate hearings on the Northwest, Southeast, Central and Rocky Mountain compacts between November, 1982 and January, 1984.

[23] *Low-Level Waste Legislation: Hearings Before the Subcomm. on Energy and the Environment, House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 2 (March 7-8, 1985) (statement of Chairman Udall).

[24] *Low-Level Radioactive Waste Disposal: Joint Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 2 (1985) (statement of Chairman Simpson).

that had been submitted. The reason was simple: despite the progress that had been made in forming compacts, no new disposal sites had been created, and the projection was that it would take until 1988 at the earliest for additional sites to open. Yet the three sited states had each entered into interstate compacts, in accordance with the 1980 Act, which would have permitted them to deny access to their disposal facilities on and after January 1, 1986.

The Senators and Representatives of the unsited states thus opposed ratification of these compacts, whereas the legislators from the sited states demanded that the promise that had been made to their states in the 1980 Act be honored.[25] Indeed, the Governors of the sited states—while expressing some willingness to continue accepting out-of-region waste under certain circumstances—threatened to take action to reduce the capacity of or close their disposal sites if they continued to be obligated to accept waste for the entire country.[26]

In an effort to break this impasse, Representative Udall, the Chairman of the House Interior Committee, drafted a bill which he then circulated to all of the States.[27] In October 1984, Representative Udal introduced a revised version of that bill.[28] Following intro-

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[25] *Id.* at 1-2; *see also Hearings on the Status of Interstate Compacts, supra* n.12, at 14 (statement of Washington State Sen. Gorton); *id.* at 22 (statement of David Stevens, Office of the Governor, Washington); *id.* at 24 (statement of S.C. State Sen. Setzler).

[26] *See, e.g., Joint Hearings on Low-Level Radioactive Waste Disposal, supra* n.24, at 48 (statement of Rep. Derrick); *id.* at 249 (testimony of Gov. Gardner).

[27] *Hearings on Low-Level Waste Legislation, supra* n.23, at 2.

[28] In February, 1985, Rep. Udall reintroduced his bill as H.R. 1083, 99th Cong., 1st Sess.; Senator McClure, the Chairman of the

duction of the bill, the National Governors' Association sponsored over a dozen meetings to attempt to arrive at a state consensus.[29] Representative Udall worked with the sited states and the Governors' Association "to see if a settlement could be achieved." [30] Ultimately the House Interior Committee reported out a revised version of Representative Udall's bill which "represent[ed] the diligent negotiating undertaken by that group" and which "embodied" the "fundamentals of their settlement." [31]

As originally introduced, Representative Udall's bill would have required the sited states, in return for obtaining approval of their regional compacts, to agree to continue receiving out-of-region waste for an additional seven years (*i.e.*, until 1993), but at a significantly reduced volume.[32] But South Carolina objected that "the seven year 'transition' period is too long" and that the "only real result from such a lengthy extension of access will be to undercut efforts to site new facilities" by "encourag[ing] the belief that, once again, the problem has been postponed until some indefinite time in the future." [33]

Eventually South Carolina agreed to accept a seven-year extension if "enforceable milestones" with "real teeth" were legislated to "ensure continuing progress toward opening new sites during the transition period." [34]

Senate Committee on Energy and Natural Resources, introduced a parallel bill, S. 1517, 99th Cong., 1st Sess. (1985).

[29] H. Brown, *The Low-Level Waste Handbook: A User's Guide to the Low-Level Radioactive Waste Policy Amendments Act of 1985* iv (Nov. 1986).

[30] 131 Cong. Rec. H13,075 (daily ed. Dec. 19, 1985).

[31] *Id.*

[32] H.R. 1083, as introduced, is reprinted in *Hearings on Low-Level Waste Legislation, supra* n.23, at 35-51.

[33] *Id.* at 295 (testimony of Gov. Richard Riley of South Carolina).

[34] *Low-Level Radioactive Waste: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 160 (June 12, July 18, 1985) (testimony of Gov. Riley); *see also id.* at 170 (Rep. Derrick).

The State of Washington strongly agreed. Senator Thurmond introduced such a bill, which was supported, at least in principle, not only by the sited states, but also by a number of the unsited states, *including the State of New York*. Thus, Charles Guinn, Deputy Commissioner for Policy and Planning of the New York State Energy Office, testified before the House Interior Committee that:

> It is appropriate for specific and easily identifiable milestones to be required to be met as incentives for continued progress on facility development by the unsited regions. Milestones which were suggested during the interregional discussions included host state selection, site identification and license application. *Appropriate penalties could be developed for failure to meet these milestones.* [*Hearings on Low-Level Waste Ltgislation, supra* n. 23, at 1981 (emphasis supplied)].

The legislation that was enacted—the Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 99-240, 99 Stat. 1842—follows this appuroach. The Act declares that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of low-level radioactive waste." *Id.* § 3(a)(1)(A), 42 U.S.C. § 2021c(a)(1)(A).[35] The Act consents to the various regional compacts that had been submitted to Congress, each of which provides for the exclusion of out-of-region waste. *Id.* §§ 211-27. The Act compels the existing sites to continue to accept out-of-region waste, within certain limits, through 1992. *Id.* § 5(a), (b), 42 U.S.C. § 2021e(a), (b). And the Act contains a set of enforceable "milestones" which the non-sited states must meet.

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[35] This language originated in Representative Udall's original bill and engendered no controversy whatsoever; the quoted language strengthens the 1980 Act which declares it to be the "policy of the Federal Government that each State is responsible for providing for the availability of capacity . . . for the disposal of low-level radioactive waste."

In particular, the Act required each state by July 1, 1986 to either ratify compact legislation or certify its intent to develop a site within the state for the location of a low-level radioactive waste disposal facility. By January 1, 1988, each non-sited compact region and each state not in any compact region was required to identify the site for the proposed disposal facility. And by January 1, 1990, each region or state was required to file a complete application with the Nuclear Regulatory Commission for a license to operate a waste disposal facility. *Id.* § 5(e), 42 U.S.C. § 2021e(e). In each case, if a region or state failed to meet a "milestone," the region or state could be denied access to the existing disposal sites. *Id.*

The Act contains one additional milestone and penalty provision—the so-called "take title" provision. That provision is not triggered until January 1, 1996—six years after each region or state was obligated to have applied to the NRC for a license to operate a disposal facility, four years after the existing sites are to be closed to out-of-region waste, and at least three years after, on the most conservative estimates, all planned-for sites should be on-line. At that time, any State which still does not have disposal capability itself or through a regional compact, will be required, upon the request of a generator or owner of waste within the State, to

> take title to the waste . . . take possession of the waste, and . . . be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the state to take possession of the waste . . . [*Id.* § 5(d)(2)(C), 42 U.S.C. § 2021e(d)(2)(C).]

This last provision originated with the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works chaired by Senator Simpson.[36]

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[36] *See* S. 1578, 99th Cong., 1st Sess. § 5(g)(92)(C) (1985) (as reported). *See also* 131 Cong. Rec. 38,141 (1985) (remarks of Sen. Johnston).

It was added to the bill, as Senator Hart, the ranking minority member of the Subcommittee explained, because:

> We were concerned . . . that a state may choose to "manage" its waste by telling the waste generators that they had to develop a means of storage for their waste. Such a policy would be unacceptable from our perspective and would leave generators with no effective recourse. [131 Cong. Rec. 18,405].

As testimony before Congress made evident, the long term storage of nuclear waste by generators would create a threat to public health and safety:

> There is a basis in radiological health and safety for a firm deadline for the execution of both state and federal disposal responsibilities. For many generators of LLW [low-level waste], the only feasible alternative to disposal short of curtailing waste generation is storage. Long-term storage would likely result in additional occupational radiation exposures, particularly if waste repackaging is needed to meet transportation or disposal requirements. Although some long-term storage is probably unavoidable under current circumstances, this practice should not continue indefinitely. A firm deadline for the acceptance of wastes for disposal by both the states and the federal government is essential to provide assurance that long-term storage does not become *de facto* disposal for lack of an alternative. [*Low-Level Radioactive Waste: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 352 (1985) (comments of Nuclear Regulatory Commission)].[37]

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[37] *See also Joint Hearings on Low-Level Radioactive Waste Disposal, supra* n.24 (testimony of J. Vaughan, Department of Energy) ("As drafted, if a State or compact region didn't meet their specified milestones, penalties contained in the bills accrue primarily to waste generators within that State or compact region, either by loss of access or by increased fees, or both. Congress may wish to clarify the specific responsibilities of the States themselves for managing their waste if they don't meet the milestones"); *id.* at

Thus, a policy of leaving waste disposal to the generator was deemed "unacceptable" by Congress, 131 Cong. Rec. 18,405 (Sen. Hart), and the take-title provision was added, as Senator Hart explained, to

> make it clear . . . that States cannot continue to rely on other entities to solve the low-level waste disposal problem and we require States to take title to the waste in 1996. . . . [131 Cong. Rec. 38,406].

Senator Johnston added:

> In my opinion, this language is essential to provide the teeth . . . We need this language to ensure that we are not faced in the 1990's with the same situation we face today—inaction by a few generating States and no available leverage to force action [*Id.*]

3. a. Turning now to the legal question posed by this sequence of events, we begin by defining the issues raised by petitioners' challenge to the Act.

When the States exercise primary regulatory responsibility in an area where the regulation must accomplish both state and federal objectives, it is necessary—as the States themselves recognized in their legislative proposals to Congress here—to take account of the possibility that a state will act in a manner that furthers its interests and that fails to further the national interests. It is precisely because of this possibility that the Act at issue, after providing that the States are to have the primary regulatory authority, places affirmative obligations on "state regulatory machinery to advance federal goals." *FERC v. Mississippi*, *supra*, 456 U.S. at 759.

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79 ("It would be a particularly unfortunate development if States that did *not* pursue compact formation or development of their own disposal facilities required their waste generators to store waste on a prolonged interim basis. This could be inadvisable from technical, environmental, financial, and policy standpoints"); *id.* at 112 (testimony of Nuclear Regulatory Commission) (agreeing with testimony of Department of Energy).

As the Council of State Governments acknowledges in its brief *amicus curiae*, the only alternative that would safeguard the federal interests involved would leave the States with *less*, not more, ability to govern with respect to the disposal of low-level radioactive waste:

> Without doubt, finding responsible ways to dispose of radioactive waste is an important concern. But any federal interest in regulating radioactive waste disposal can easily be vindicated without issuing directives to the states. Congress has the unquestioned power to regulate interstate traffic in radioactive waste. It has full authority to designate, and even acquire by condemnation, adequate disposal sites. [Brief *Amicus Curiae* of Council of State Governments at 17.]

Very simply stated, then, the argument on petitioners' side is that where both national and state interests are involved, the Constitution dictates that any federal legislation designed to further both sets of interests must be administered solely by federal authorities. That argument frames the ultimate issue in this case.

b. It is important to place this issue in its proper context, and to distinguish the issue presented here from other related issues.

Our constitutional system does not create a relationship between the States and the federal government, or between the individual states *inter se*, that partakes of the relationship between sovereign nations. In relation to the States, the United States has only those limited powers expressly delegated to the federal government by the Constitution. The States, in turn, retain sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). It is very much to the point here, for example, that, as we have seen, the Commerce Clause denies each

state the sovereign power to control commerce between its citizens and citizens of other states.

One aspect of the constitutional limitations on the sovereignty of the States has been addressed in depth by the line of cases culminating in *Garcia*: "the extent to which state sovereignty shields the States from generally applicable federal regulations." *FERC v. Mississippi*, 456 U.S. 742, 759 (1982). Specifically, the question confronted by the *Garcia* cases is whether the Constitution exempts a state in its capacity as an economic actor—*viz*, as an employer, a waste generator, or as part of any other class of actors who are in, or who affect, interstate commerce—from federal regulations that are generally applicable to the class of actors to which the state belongs.

The *Garcia* Court "reject[ed] as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" 469 U.S. at 547-548. And the Court ruled that any broader rule of state immunity from federal regulation would be inconsistent with "the shape of the constitutional scheme," *id.* at 550, which "works a[] . . . sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative power and to displace contrary state legislation," *id.* at 548. *Garcia* explains that "apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I power," insofar as the States seek protection from efforts by the federal government to displace state laws with uniform federal rules, "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself," *id.* at 550-551.[38]

[38] *Garcia* is the law and this is not an occasion that calls for further elaboration on its rationale. We would be derelict, however, if we did not respond to the attack on that decision in the brief filed by *Amicus Curiae* Council of State Governments. That brief argues

We recognize that the question posed here is different from that posed in *Garcia*, and that the result in *Garcia*

(Br. at 15) that insofar as *Garcia* reads the framers to have relied on the political process to protect the interest of the States, the decision is "alien to ordinary principles of constitutional interpretation" because "structural postulates" are not "ordinarily left to the tender mercies of the political process." The Council argues that the Court's "approach to the balance between state and federal authority" should "parallel" its "approach to policing the borders of executive or legislative power." *Id.* at 14.

But *Garcia* adopts such a parallel by emphasizing the role of the judiciary in confining Congress to the exercise of its enumerated powers, just as the judiciary, in separation-of-powers cases, confines each branch to its enumerated powers. That emphasis far from being "alien" is deeply rooted in a great mass of constitutional history and precedent. Thus, the *Garcia* Court—like the Court in *Sperry v. Florida*, 373 U.S. 379, 403 (1963) and *Reina v. United States*, 364 U.S. 507, 512 (1960)—quoted James Madison's statement in the First Congress during the debates over the creation of the Bank of the United States:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given they might exercise it, although it should interfere with the laws or even the Constitution of the States. [II Annals of Cong. 1987]

See also 3 *The Debates in the Several States Conventions on the Adoption of the Federal Constitution* at 186 (Virginia) (J. Eliot ed.) (if "a question arises with respect to the legality of any power exercised or assessed by Congress," the judiciary would ask "is it enumerated in the Constitution. If it be, it is legal and just"); 3 J. Story, *Commentaries on the Constitution of the United States* 753-54 (1st ed. 1833) ("It is plain . . . that it could not have been the intention of the framers of this [Tenth] amendment to give it effect as an abridgment of any of the powers granted under the constitution . . . . Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted"); *Northern Securities Co. v. United States*, 193 U.S. 197, 345 (1904); *Hoke v. United States*, 227 U.S. 308, 320 (1913); *United States v. Sprague*, 282 U.S. 716, 733 (1931); *Sanitary District v. United States*, 266 U.S. 405, 424-26 (1925); *United States v. California*, 297 U.S. 175, 183-84 (1936); *Ashwander v. TVA*, 297 U.S. 288, 330 (1936); *Wright v. Union Central Ins. Co.*, 304 U.S.

may not govern the decision in this case. What is involved here is a set of affirmative obligations established by federal law that applies only to the States, and not to a more general class of economic actors, and that applies to the States in their unique capacities as law generators and law enforcers. The claim in his case is not that state law must prevail over federal law but rather that federal law cannot compel the States to enact laws against the States' desires.

c. This Court has on at least two occasions recognized that the issue posed by this kind of federal regulation is distinct from the issue posed in the *Garcia* line of cases. *FERC v. Mississippi*, 456 U.S. 758-59 ("the extent to which state sovereignty shields the States from generally applicable federal regulations" is a different issue from the validity of "Federal Government attempts to use state machinery to advance federal goals"); *South Carolina v. Baker*, 485 U.S. 505, 543-44 (1988) (same). *See also*, Brief for Petitioner State of New York at 19; Brief for *Amicus Curiae* Council of State Governments at 11.

The Court has not, however, elaborated the standards that govern the constitutional propriety of a federal regulatory scheme that enlists state authorities to pursue federal objectives. As we show at pp. 24-25, *infra*, the Court has only gone so far as to indicate that there is *no* absolute constitutional bar to such a scheme. And for the reasons we set forth below, an absolute bar would be destructive of the very values that the bar would be meant to protect: strong state government and a dynamic federal system.

Against that background we proceed on the understanding that the general guide for judging the constitutionality of any such federal regulatory scheme is that set out

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502, 516 (1938); *United States v. Darby*, 312 U.S. 100, 124 (1941); *California v. United States*, 320 U.S. 577, 586 (1944); *Case v. Bowles*, 327 U.S. 92, 101-02 (1946).

by the *FERC* Court: whether the scheme in fact undermines the relationship between the States and the United States that is established by the Constitution—specifically, whether the scheme "impairs the ability of the States 'to function effectively in a federal system.'" *FERC v. Mississippi*, 456 U.S. at 765-766 (quoting *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975)). The Act in question here causes no such impairment.

d. In the final analysis, petitioners and their *amicus curiae* do not base their constitutional claim on the plain language of the Constitution. Rather, their contention is that federal schemes of the kind at issue here are contrary to the theory and structure of the Constitution in the following respect: If the United States can direct state agencies to carry out politically controversial federal policies, the federal government could escape accountability for those policies and the States could be held politically accountable for actions that are not of their own making. This, we are told, would be destructive of political accountability at both the state and federal levels. In the context of the instant case these concerns about the proper allocation of responsibility between the United States and the States have a hollow sound.

Viewed in practical, as opposed to theoretical, terms, it is implausible to characterize the Act as a mechanism for depriving the States of aspects of their sovereignty. The means employed by the Act cannot sensibly be divorced from its overall purpose: to *permit* the States to exercise the primary regulatory authority in an area where a scheme of direct federal regulation would have been warranted—and was indeed proposed—in view of the important national concerns involved. The States sought this regulatory authority in order to preserve their ability to make determinations of great local sensitivity.

The obligations the Act places on the States (and/or on compact regions) are to establish and site sufficient and appropriate waste disposal facilities. The history of this

legislation shows that the States sought these precise obligations. The States did so precisely because of a consensus at the state level that it was *not* desirable for the federal government to site and establish these facilities. The legislative proposals submitted by the States—and expressly supported by, *inter alia*, the State of New York, *see* p. 15, *supra*—contain the very affirmative regulatory obligations that New York now challenges. *See* pp. 15-16, *supra*.

The Act, moreover, assures the States control over that for which the States will be held accountable: both the number of disposal facilities to be sited and the siting of particular disposal facilities are to be determined by the States, acting either on an individual basis or through regional compacts, and without any active federal role. Neither the Act nor any federal authority dictates the determinations to be made by the States in these respects. Instead, the Act provides incentives, both positive and negative, to induce the States to make those determinations in a way that fulfills not only the local interests but the national interests that are involved.

Finally, in the absence of the legislation, the non-sited states had rights with respect to low-level waste disposal and the sited states had obligations in that connection that are *not* characteristic of sovereign entities. The non-sited states had the right of access to disposal sites in sited states on a nondiscriminatory basis; and the sited states had the obligation to accept such waste on that basis. *See* pp. 5, 7, *supra*. Nothing in the law of nations or in any concept of sovereignty creates such a right or such a corresponding obligation. The Act thus *restores* to the sited states an attribute of sovereignty that the Commerce Clause by itself takes away.

In these circumstances, it cannot fairly be maintained that the Act "impairs the ability of the States to function effectively in a federal system." *FERC v. Mississippi*, 456 U.S. at 765-66. Thus, the Act could be subject to

constitutional invalidation only if the Constitution erects an absolute bar to federal legislation that enlists state agencies in the enforcement of federal laws. What little precedent exists on this point in this Court's decisions indicates that the Constitution does *not* absolutely bar the "enlist-[ment of] a branch of state government . . . to further federal ends." *FERC v. Mississippi*, 456 U.S. at 762. In that case the Court summarized its prior decisions as follows:

> While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. *EPA v. Brown*, 431 U.S. 99 (1977), there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions. In *Fry v. United States*, 421 U.S. 542 (1975), for example, state executives were held restricted, with respect to state employees, to the wage and salary limitations established by the Economic Stabilization Act of 1970. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979), acknowledged a federal court's power to enforce a treaty by compelling a state agency to "prepare" certain rules "even if state law withholds from [it] the power to do so." *Id.*, at 695. And certainly *Testa v. Katt*, *supra*, by declaring that "the policy of the federal Act is the prevailing policy in every state," 330 U.S. at 393, reveals that the Federal Government has some power to enlist a branch of state government—there the judiciary—to further federal ends. [456 U.S. at 761-762 (footnote omitted)].

While it may be that certain federal schemes that enlist state agencies could threaten the integrity of state government and thus implicate *implicit* constitutional values, we know of no constitutional value that absolutely bars that approach in the instances in which the approach *is* perfectly compatible with—indeed, enhances—"the ability of the States 'to function effectively in a federal system'." *Id.* at 765-66.

As the instant case illustrates, such an absolute bar would serve neither the interest of strong state government nor that of a vital and dynamic federal system. As a by-product of our technological progress, we face a growing number of situations—like the one here—in which there is a pressing need for national regulation of transactions that have aspects that are peculiarly of national concern and aspects that are peculiarly of local concern. In the instant case, a cooperative legislative effort between the States and the Congress resulted in a regulatory scheme that preserved—and, in at least one respect, enhanced, *see* p. 24, *supra*—the regulatory authority of the States while at the same time accomplishing national objectives.

If that option had not been available, the Congress had the Commerce Clause power—and it appears the will—to enact direct federal regulation of low-level radioactive waste disposal and to oust the States from all regulatory authority. And, in general, a rigid constitutional rule barring all employment of state authorities in federal regulatory programs would push toward a greater, not a lesser, concentration of power in the hands of the central government. Faced with the choice of addressing national problems through federal regulation or not at all, the United States would inevitably occupy more and more of the ground on which the States and the federal government have overlapping, albeit not congruent, interests. Our federalism would not be served by such a self-destructive construction of the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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